No. 88- 88-1977

In The

Supreme Court of the United States

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

October Term, 1988

In Re:

THE BIBLE SPEAKS,

Debtor.

THE BIBLE SPEAKS, INC.,

Petitioner,

-against-

ELIZABETH DOVYDENAS,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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APPENDIX A - JUDGMENT AND OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT [PP. 1a - 47a]

United States Court of Appeals

FOR THE FIRST CIRCUIT

No. 88-1254

IN RE:
THE BIBLE SPEAKS
Debtor,

ELIZABETH DOVYDENAS,
Plaintiff, Appellee,

v.

THE BIBLE SPEAKS,
Defendant, Appellant.

JUDGMENT

March 9, 1989

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed in part and reversed in part. The rescession of the gift of $5,000,325 and the rescession of the gift of $500,000

are affirmed. The recession of the gift of $1,001,031.25 and the recession of the gift totalling $80,000 are reversed.

No costs to either party on appeal.

By the Court:

s/ FRANCIS P. SCIGLIANO,
Clerk.

By s/ DANIEL F. LOUGHRY
Chief Deputy Clerk

APPENDIX A

[Judgment and Opinion - USCA (1st Cir. 1989)]

United States Court of Appeals

For The First Circuit

No. 88-1254

IN RE: THE BIBLE SPEAKS,

Debtor.

ELIZABETH DOVYDENAS,

Plaintiff, Appellee,

v.

THE BIBLE SPEAKS,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Frank H. Freedman, *U. S. District Judge*]

March 9, 1989

BOWNES, *Circuit Judge*. In this undue influence case, the defendant church, the Bible Speaks (TBS), appeals the district court's affirmance of the bankruptcy court's finding of liability. *See The Bible Speaks v. Dovydenas*, 81 B.R. 750 (D. Mass. 1988) (*TBS II*); *In re The Bible Speaks*, 73 B.R. 848 (Bankr. D. Mass. 1987) (*TBS I*). The unique procedural history of the case was detailed by the district court.

> TBS brought suit in Berkshire Superior Court [Massachusetts] against Elizabeth Dovydenas on April 14, 1986 seeking a declaratory judgment that it did not owe her any debt or liability and that it did not have to return funds transferred by her. This suit was dismissed on June 13, 1986. The Massachusetts Appeals Court dismissal was affirmed on April 8, 1987.
>
> Elizabeth Dovydenas then brought suit on June 19, 1986 in Berkshire Superior Court against TBS. She sought rescission of gifts made by her between December 1984 and December 1985 because of undue influence and fraud. After its motion to dismiss was denied on July 15, 1986, TBS sought protection of the bankruptcy court filing for Chapter 11 reorganization on July 29, 1986. Its petition, which stayed the state court action, stated that Elizabeth Dovydenas' claim against it was a core proceeding. Elizabeth Dovydenas then filed a proof of claim with the bankruptcy court on October 31, 1986. The three-week trial on the merits began on March 30, 1987 and ended on April 16, 1987. The bankruptcy court issued its final order on May 19, 1987. By assuming jurisdiction of TBS over the claimant's

> objection, the bankruptcy court entered into the process of administering TBS' estate while it reorganized under Chapter 11. 81 B. R. at 753 - 54.

Plaintiff's claim in the bankruptcy court was for the return of gifts made to TBS, allegedly because of undue influence. The bankruptcy court found that the gifts were the results of undue influence and awarded her $6,581,356.25, which was the total of three large gifts and a number of smaller ones. After reviewing the record, the district court accepted and adopted in full the bankruptcy court's findings of facts. Both courts rejected the first amendment - free exercise claim of TBS.

We affirm in part and reverse in part.

I. THE STANDARD OF REVIEW

The bankruptcy court made extensive findings of facts. See *TBS I*, 73 B.R. at 849 - 57. Credibility was a key factor in determining the facts. *Id.* at 857. We review the bankruptcy court's findings of fact under the clearly erroneous standard. Bankr. R. 8013;[1] Fed. R. Civ. P. 52(a).

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[1] Bankruptcy Rule 8013 reads in full:

> On an appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgement, order, or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

In *Briden v. Foley*, 776 F.2d 379, 381 (1st Cir. 1985), we held, in a bankruptcy case, that the clearly erroneous standard was especially appropriate where credibility was at issue, stating: "Indeed, the clearly erroneous standard was designed to insulate just such findings -- ones that are based, *inter alia*, on weighing the credibility of witnesses." *Id.* at 382. *See also In re Pearson Bros.*, 787 F.2d 1157, 1161 (7th Cir. 1986). The clearly erroneous standard has been explained by the Supreme Court as follows:

> Although the meaning of the phrase "clearly erroneous" is not immediately apparent, certain general principles governing the exercise of the appellate court's power to overturn findings of a district court may be derived from our cases. The foremost of these principles, as the Fourth Circuit itself recognized is that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 (a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide

> factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U. S. 100, 123 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *United States v. Yellow Cab Co.*, 338 U. S. 338, 342 (1949); *see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U. S. 844 (1982).
>
> * * *
>
> When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what it said. *See Wainwright v. Witt*, 469 U. S. 412 (1985).

Anderson v. Bessemer City, 470 U. S. 564, 573 - 74, 575 (1985).

We have reviewed the entire record carefully and conclude that the bankruptcy court's findings, including its credibility determinations, are not clearly erroneous. The bankruptcy court found the testimony of plaintiff and her husband "forthright and credible" and the testimony of defendant's witnesses "evasive and lacking in credibility." *TBS I*, 73 B.R. at 857. All credibility conflicts were resolved in favor of the plaintiff.

Because of our decision, *infra*, that the first amendment is not implicated in this case, we do not reach TBS' argument that its first amendment claim requires that we independently review the facts. *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U. S. 485 (1984) (free speech-libel case); *Bender v. Williamsport Area School Dist.*, 741 F. 2d 538, 542 n.3 (3d Cir. 1984) (free exercise case), *vacated on other grounds*, 475 U. S. 534 (1986).

II. THE FACTS

At issue are three major gifts made by plaintiff to TBS in the amounts of $1,001,031.25, $5,000,325[2] and $500,000 and a number of smaller gifts totaling $80,000. Because of the importance of the facts on the issue of undue influence, we recite them in detail. Much of the testimony of the plaintiff was disputed, denied, or contradicted by Pastor Stevens, founder of TBS, and other members of TBS. Since the bankruptcy court found in favor of plaintiff, we state the facts in the light most favorable to her. Where there is a significant conflict between the plaintiff's testimony and those testifying on behalf of TBS, we have stated defendant's testimony in detail.

The Parties

Elizabeth Dayton Dovydenas, the plaintiff, was born in 1952 and grew up in Minnesota. She is an heir to the Dayton-Hudson fortune. Jonas Dovydenas is a freelance photographer.

[2] These two gifts will be referred to as the $1,000,000 gift and $5,000,000 gift, respectively.

Plaintiff met him in 1977 when he taught a photography class in Minnesota in which she enrolled. In December of 1978, they were married. Because plaintiff was so much wealthier than Jonas, they decided that he need not work in order to support them, but rather, he should concentrate on his art and family projects. Plaintiff had a fortune of approximately $19,000,000, most of which was held by Okabena, the family-owned investment company based in Minnesota. Prior to her gifts to TBS, plaintiff's charitable contributions averaged about $10,000 per year, with a high of $127,000 in 1977 to an art center.

In the Spring of 1981, Jonas and plaintiff moved to Lenox, Massachusetts. The move was unrelated to TBS - - neither plaintiff nor Jonas knew of TBS at this time. They hired Irene Colby as a housekeeper; she happened to be a member of TBS.

After moving to Lenox, plaintiff was interested in joining a church. In 1982, after visiting a few which she did not like, she and Jonas went to TBS. They liked what they saw and heard and left a $500 check in the collection plate.

TBS was founded in 1971 in Maine by Carl Stevens with 35 to 50 members. Stevens has no formal Bible study training but he has been a Fundamentalist preacher for 26 years. TBS is organized as a non-profit organization with Stevens as its head. It has a 12 person Board of Trustees which must approve Stevens' decisions. In case of a deadlock, a group of elders decides the outcome of an issue. In 1976, TBS moved to its current location in Lenox, Massachusetts, having grown to approximately 800 to 900 members. As of 1987, there were approximately 1,300 members. A large campus was purchased with member contributions; it contained a children's school for grades K-12, a nursery and the Stevens School of the Bible.

Stevens taught at the Bible School and preached at the Church. TBS also ran radio and television ministries as well as operating a missionary boat, *La Gracia*, in the Caribbean. It has a network of voluntary affiliates across the globe. In 1982, there were between 18 and 20 such affiliated churches. By 1987, that number had grown to about 100 with a world-wide membership of about 17,000. There are also about 160 missions in 26 countries.

THE PRELUDE

PLAINTIFF'S TESTIMONY

After the $500 check was left in the collection plate, Maureen Shea, plaintiff's new housekeeper and also a member of TBS (who was recommended by Colby when Colby left)[3] brought to the house two TBS pastors, Thomas Schaller and John Lloyd, who set a date for Pastor Stevens to come for tea. Sometime in the Winter of 1982 - 83, Stevens and Barbara Baum, Stevens' lady friend at the time (he later married her), did go to plaintiff's house for tea. At this time, Stevens asked plaintiff and Jonas if they had "accepted Christ" and both answered no. At this first meeting, when Stevens was alone with plaintiff, he asked her for money for a counselling center. She gave him a check for $2,000. Baum and plaintiff were the same age, and they became friends.

Jonas' stay with TBS was brief. At one point he and plaintiff loaned (and later turned the loan into a gift) $50,000

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3 Each replacement or addition to plaintiff's staff was made by one TBS member recommending another.

for *La Gracia*; Jonas also spent some time on *La Gracia* photographing the boat and its missionary operations. Jonas' activity in TBS decreased as plaintiff's activity increased.

In the summer of 1983, plaintiff's and Baum's friendship blossomed as plaintiff began attending TBS services. One day while Baum and plaintiff were talking on TBS campus, plaintiff asked Baum about tithing and being born again. Baum took plaintiff to see Stevens without a prior appointment, which was unusual. The three conferred; Baum took notes for plaintiff. Stevens was told that plaintiff was born again but that Jonas was not. To this, he responded that plaintiff was saved and in the light and that Jonas was not saved and was living in darkness. On the subject of tithing, Stevens directed plaintiff to some Bible passages on the subject of giving and not withholding from God. Baum typed up the notes she had taken and gave them to plaintiff.

In September 1983, plaintiff enrolled in two classes at the Stevens School of the Bible. Stevens taught these classes which met Monday through Friday 8 a.m. to 9 a.m. and had an enrollment of about two hundred students. From 9 a.m. to 10 a.m., plaintiff attended a rap session led by Stevens which was also well attended but not as large as the class. Plaintiff was occasionally alone with Stevens in 1983. Late in 1983, Baum introduced plaintiff to Kathleen Hill, a member and employee of TBS and Baum's best friend. Plaintiff and Hill became friends.

In 1984, plaintiff became more involved in TBS activities and saw much more of Hill and Baum. Early in the year, Hill encouraged her to take charge of a women's seminar which was held in March. Plaintiff saw Hill and Baum

frequently at lunch or TBS sponsored brunches. Plaintiff continued attending classes and rap sessions. She and Stevens also began spending more time together.[4] She began accompanying him on his weekly Friday evening trips to Framingham, Massachusetts, where he preached at an affiliated church. Plaintiff's relationships with her non-TBS friends deteriorated as she spent more and more time with Stevens, Baum, and Hill.

In the period from November 1984 to April 1985, plaintiff saw Stevens alone on a daily basis: driving with him from class to rap sessions; seeing him at 11 a.m. after he finished with Telephone Time (a radio ministry); meeting with him in his office without a prior appointment; and driving with him to and from Framingham. Plaintiff testified that in these private meetings, she was given advice on religious, financial, and personal matters. She was told that she had to obey Stevens because he was the highest authority on earth. She was also told to listen to tapes of Stevens' speeches over and over and to takes notes of all Stevens told her and then study those notes. She was to inundate her mind with Stevens' words. She disclosed her net worth to him, and he told her that her mission in life was to give and that her gifts could cause great events. Many discussions with Stevens, Baum and Hill focused on plaintiff's money and her giving it to others. Stevens told her that Jonas should get a job and that the family only needed $1,000,000 to live on. She was told not to listen to evil reports and that Jonas, his parents and her family were evil and were controlled by Satan and demons.

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[4] There has never been any suggestion that Stevens' and plaintiff's relationship was anything but platonic.

DEFENDANT'S TESTIMONY

TBS' witnesses presented the following version of the same events. At trial, neither Schaller nor Lloyd were asked whether they set up the first meeting between Stevens and plaintiff; Stevens denied having sent them as emissaries. He did dine at plaintiff's house once at her invitation (Baum remembered twice). At this time, he asked if plaintiff and Jonas had accepted Christ; Jonas said no and plaintiff's response is unknown. Baum testified that only Jonas was asked and she took his ambiguous response to mean "no." At this dinner, Stevens did not ask for or receive any money. He did not know that plaintiff was wealthy nor did he encourage the budding friendship between plaintiff and Baum because of her money. It was plaintiff who sought out Baum in the beginning of their friendship.

Stevens did not recall any meetings with plaintiff in 1983. Baum testified that the tithing and born-again conversation occurred in January 1984; Stevens also put the meeting at that time.[5] During the January meetings, they discussed Bible passages on tithing and giving as well as how to relate to Jonas. Stevens did not say that Jonas was a non-believer or that he was unsaved.

Stevens denied seeing plaintiff in 1984 except for class, rap sessions, group lunches and by appointment. He did not recall driving with plaintiff to Framingham until 1985. The

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5 Stevens' calendar shows two meetings with plaintiff and Hill in January. Stevens testified that Hill was detained with TBS work and that Baum filled in for Hill.

women's seminar was plaintiff's idea. Baum saw plaintiff at least once a week, mainly for prayer sessions.

Stevens testified that at no time could plaintiff see him without an appointment. His day was too busy for anyone to do so, except for TBS pastors and emergencies. He never said that he was especially anointed by God or that he spoke the literal truth or that he was the highest authority on earth or that he must be obeyed. Rather, he said that he was God's man just like all preachers are God's men, that he was a sinner like all men and that he was only to be followed when he followed God. He also denied telling plaintiff, or any of his congregation, to fill their minds with only his words. He denied ever telling her that non-believers including Jonas and her family were evil, not to be trusted and controlled by demons. Nor did he say that she had a special calling to give or that her gifts could cause great events on earth. He never told plaintiff that Jonas should get a job or that all they needed to live on was $1,000,000.

The $1,000,000 Gift

PLAINTIFF'S TESTIMONY

Baum and Stevens were engaged to be married in the Fall of 1984. Baum suffered from migraine headaches which regularly incapacitated her. Plaintiff was concerned about the headaches and their impact on the upcoming marriage. Stevens had been telling plaintiff that she was a special person who should give and to whom God could speak.

Plaintiff testified that in the Fall of 1984, before Stevens' wedding, while driving back from Framingham with him, she heard three things in her head, one of which was to give TBS $1,000,000. Shortly thereafter she had a discussion with Stevens; she told him that she was going to give TBS $1,000,000 and that she believed by doing so it *would* cure Baum's headaches. Stevens replied: "Great. I don't know which would be better, the million dollars or having her healed of her headaches." Plaintiff also told Hill and Baum of her intent to give the gift and her belief that it would cure Baum's headaches.

When plaintiff told Jonas about making the gift, he opposed it. Stevens told her to ignore contrary advice from Jonas or anyone else. Jonas contacted Okabena about the gift, and Okabena replied with a letter which detailed various options for giving TBS the money over longer periods of time and with more favorable tax consequences. On November 24, Baum and Stevens were married. The gift, in the form of a transfer of Dayton-Hudson stock worth $1,001,031.25, was completed in mid-December 1984.

On December 13, 1984, Jonas and plaintiff met with Stevens. At that meeting, Stevens said that he would not take any more money from plaintiff without Jonas' consent. After the $1,000,000 gift, Stevens, Baum, and Hill each told plaintiff that Baum's headaches were cured because of the gift. In fact, Baum continued to suffer from migraines but this was kept from plaintiff. Because she had been told by Hill, Stevens and Baum that Baum's headaches had been cured, plaintiff believed that large gifts by her to TBS could effect events on earth. In February and March 1985, Stevens emphasized to plaintiff the importance of obedience, the nearness of the end of the world

and not listening to evil reports. In March and April, Stevens emphasized the ability of the holy spirit to control people.

DEFENDANT'S TESTIMONY

TBS' witnesses presented a different version of these events. Baum's migraines were frequent and severe: she would either be bed-ridden or the pain on her face would be obvious. Stevens never told plaintiff that she had a special calling to give. In the fall of 1984, Jonas told Stevens that plaintiff wished to give a large gift to TBS but did not tell him how much. On November 13, plaintiff told Stevens of the gift and its amount. At this time, she told him that after much prayer God had told her to give the money. Baum testified that plaintiff also told her that God had told plaintiff to make the gift. It was not until three weeks later that plaintiff told Baum that the gift *might* cure Baum's headaches; Baum told Stevens of plaintiff's statement. Hill was not informed of the link between the gift and the headaches until after the gift was completed. The ride from Framingham during which God spoke to plaintiff did not occur.

Stevens was not informed of Jonas' opposition to the gift until January 1985. The December 1984 meeting with Jonas was set up by Jonas to ask Stevens to contribute to a charity with which Jonas was involved. Stevens knew of the Okabena letter but never thought the gift was not freely made. Stevens denied telling plaintiff that she should ignore advice from Jonas or anyone else. He testified that what advice she got was up to her. In a January 2, 1985 meeting, Stevens learned of the marital friction developing between plaintiff and Jonas, but he did not tell her that Jonas should get a job or that she should

give more money to TBS. Until this meeting, he thought that Jonas agreed to making the gift and that the marriage was harmonious. Stevens denied seeing plaintiff except at services from then until March 1985. In the Spring, he gave a series of sermons on giving but these were not directed at plaintiff and dealt with spiritual gifts such as mercy and helps. Stevens denied ever telling plaintiff not to listen to non-TBS members.

Stevens, Baum and Hill all denied telling plaintiff that Baum's headaches were cured. Immediately after the gift was made, Baum did feel better for about three weeks, and plaintiff was told this. But, at a January 2, 1985 lunch, at which plaintiff was present, Baum was stricken with another migraine; although nobody told plaintiff that it was a headache, this fact was obvious to all who were present. No one specifically told plaintiff that the headaches had returned,[6] but, no effort was made to conceal that fact from her.

The $5,000,000 Gift

PLAINTIFF'S TESTIMONY

In March 1985, plaintiff told Stevens that she had heard God tell her to give $5,000,000 to TBS in June. Stevens

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6 Baum offered contradictory testimony as to whether she ever actually told plaintiff that her headaches had returned: at first she said that she had not, but after a recess during which she talked to TBS' attorney, she said that she had.

told her not to tell Jonas about this. In early April, she again discussed the gift with Stevens while Baum was present.

Plaintiff had planned a trip with Jonas and her children to Florida on April 18 for her mother's birthday. On the morning of the 18th, before she left for Florida, Baum called her. Baum told he that Ben Turkia, a TBS pastor, had been detained in Rumania and that "they're probably pulling his fingernails out right now." Baum requested that plaintiff pray for Turkia. Plaintiff proceeded to Florida as scheduled. Jonas left after a few days while plaintiff stayed for another week. Right after Jonas left, on the evening of Sunday April 21, plaintiff called Stevens. She told him that she wanted to give the $5,000,000 right away in order to effectuate Turkia's release, to which Stevens responded, "Great, get a jump on the devil." At this time, he did not tell her that Turkia had already been released. Stevens emphasized that she should not tell anyone, especially Jonas about the gift. The next day, she wrote to Ron Gross at Okabena requesting that the gift be made as soon as possible. She did not discuss the gift with any outside advisors. Upon returning to Lenox, she met frequently with Hill and Stevens. Both cautioned her against telling anyone, including Turkia, that she had worked a miracle, though they assured her that she had.

There was a dispute as to who knew what and when about the events surrounding the Turkia incident. Prior to trial, an attorney for TBS stipulated that: **1.** Turkia and a companion entered Rumania on April 16, 1985; **2.** Turkia and his companion were detained at the border and interrogated; **3.** they were released and returned to Austria *via* Budapest, Hungary on April 17; and **4.** while in Budapest, Turkia called his wife in Baltimore and told her of both the detention and

release - - the call was made on April 17 late in the evening Budapest time (early in the evening Eastern time).

At trial, there was evidence that in April 1985, Mrs. Turkia was living on TBS campus. Turkia and his companion were detained on April 16, 1985 in Rumania. They were released on April 17, arriving in Budapest, Hungary that evening. His companion called a friend in Pennsylvania who was told to call Mrs. Turkia. The friend in Pennsylvania called Mrs. Turkia. Mrs. Turkia immediately called Pastor Schaller, who called Stevens and Baum. By April 18, Turkia was in Austria staying with friends. That evening, Mrs. Turkia called Austria twice. The first call was a short one to friends, but not to where Turkia was staying. The second was a twelve minute call to the house where Turkia was staying. Turkia returned to the United States on April 24.

The bankruptcy court refused to allow TBS to withdraw the stipulation. On a motion by plaintiff, it struck portions of Turkia's, Mrs. Turkia's and Schaller's testimony to the extent they conflicted with the stipulation. The court's finding does not rely exclusively on the stipulation, but is based also on portions of the testimony of the above witnesses. The court found:

> Turkia had been detained by Romanian border guards for only 24 hours, and had been released on April 17th. He arrived in Budapest, Hungary on April 17th at 8:00 P.M. Budapest time, at which point his companion placed a call to a friend in Pennsylvania informing him of what had happened and requesting him to call Turkia's wife. Turkia's wife was immediately informed

> of the detention *and release*. She was then living in Lenox in the home of Edward Canino ("Canino"), an employee of the Church.

TBS I, 73 B.R. at 852 (emphasis added). The court also found "that Stevens and Baum were aware of Turkia's release when they discussed the impending $5 million gift with the [plaintiff] over the telephone on the evening of April 21st." *Id.* at 863.

Upon her return to Lenox from Florida, plaintiff met with Stevens and Hill. At those meetings, strategy for making Okabena deliver the gift quickly and confidentially was discussed. Stevens and Hill told plaintiff what to say to Okabena; except for the first call, Hill was with plaintiff whenever she talked to Okabena. On April 27, 1985, plaintiff, Stevens, Baum, Hill and Hill's husband went to a restaurant. At that time, Stevens told her that her $5,000,000 gift would be particularly influential in shaping the world for the return of God. Stevens also told plaintiff to write a letter to him and told her what to put in the letter. The next day, Hill dictated this letter to plaintiff who wrote it as she was told. The letter was given to Hill who gave it to Stevens. The letter stated that God had spoken to her, which was why she was making the gift, that no one from TBS had asked her for the gift or knew about it and that Stevens was to administer the gift.

On April 30, plaintiff's father called her because he had learned from his brother, an official at Okabena, of the proposed gift. In addition to inquiring about the gift, her father told her that he was going to visit her. She told her father to call back later and immediately called Stevens who told her to come to his office. Once there, Stevens told her to tell her

father that a much smaller amount was being given. She agreed to do so and told Stevens that Jonas would be there that evening and would overhear her talk with her father. Stevens called a TBS employee, Ed Canino, and told him to take Jonas out for a long dinner. That evening plaintiff disarmed her father and convinced him not to visit her. The gift was completed on May 13, 1985 by transferring shares of Dayton-Hudson stock worth $5,000,325 to TBS.

Stevens told plaintiff to get a post office box so that Jonas would not see any mail regarding the $5,000,000 gift or plaintiff's finances. She rented the box on April 30, 1985 and told Okabena to send all mail addressed to her there.

In late May 1985, after Jonas returned from a trip to Afghanistan, Hill, Stevens and plaintiff met. Hill suggested that Stevens write a letter to plaintiff that plaintiff leave the letter for Jonas to find. Thereafter, Stevens wrote a letter to plaintiff stating that she should honor Jonas and seek his advice in major financial matters. Stevens also wrote that he thought Jonas loved his family and God. Plaintiff left the letter for Jonas to find. Despite what Stevens wrote, he told plaintiff not to trust or listen to Jonas because he was a non-believing husband.

DEFENDANT'S TESTIMONY

TBS' version of these events was again strikingly dissimilar. On March 19, plaintiff told Stevens that she was planning another large gift but she did not say how large. This meeting mainly concerned putting her son in a big brother program run by the Church. During the meeting, plaintiff also

raised concerns about Jonas and his spendthrift ways. Stevens realized that there were serious problems when plaintiff said that Jonas was going to die because of his demons. Stevens told her not to judge Jonas.

On April 11, Stevens met with plaintiff again. When she again stated that she wished to make a large gift, he asked her if the gift would harm her marriage, her family or her future security. She replied that it would not. Stevens was still not told how large a gift plaintiff was considering but gained some idea of the amount when plaintiff circled some items she wanted the gift to go toward. Because of TBS' policy against direct solicitation of gifts, Stevens asked plaintiff whether there had been a solicitation by any TBS member. Plaintiff responded that there had been no solicitation and that God had led her to give. She asked Stevens if he wanted this in writing and Stevens replied that he would.

Turkia is connected not only with TBS but also with other religious groups. The trip he made in April 1985 was for an organization unconnected with TBS.[7] Turkia was acquainted with plaintiff and Jonas because he had worked on plaintiff's estate cutting wood. Pastor Schaller told Stevens of the detention on April 16 or 17. Schaller had learned this from Mrs. Turkia who thought the friend in Pennsylvania had said that Turkia was still in custody and was facing a long prison sentence. Mrs. Turkia contended that she was unable to reach Turkia when she called Austria on April 18. As of the evening of April 21, the people at TBS still believed Turkia to be under Rumanian detention. On that evening, after regular services, a

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[7] This claim of no connection with TBS is undercut by the fact that TBS wrote a $1,000 check to Turkia's travelling companion in June 1985.

special prayer service was held for him. Stevens did not learn of the actual chronology until after Turkia returned. Schaller learned of Turkia's release between April 21 and 24 when he called the friend in Pennsylvania and learned of the miscommunication between Mrs. Turkia and the friend. He then informed Mrs. Turkia, Baum and Stevens of Turkia's release.

On April 21, plaintiff spoke to Baum and *not* Stevens. In that conversation, plaintiff did not say that she wanted to give the gift earlier in order to save Turkia but rather, she wanted to give earlier as an inspiration from Turkia. Upon Turkia's return and at all times thereafter, nobody at TBS attempted to hide the actual chronology from plaintiff and no one ever told her that her gift had caused Turkia's release. Plaintiff was not prevented from discussing the events with Turkia when he was in Lenox.

As to when Stevens knew of the amount of the gift, he and other TBS pastors testified that it was not until after the Turkia incident was concluded.[8] They said that several large gifts were being discussed during this time frame. Stevens learned of the amount when he received plaintiff's letter on April 28. Stevens did not request that letter except as noted above and he did not ask Hill to get plaintiff to write it. The meeting at which plaintiff said he requested the letter did not occur. Stevens contended that it could not have occurred since he stayed in Framingham on the night of April 26 - 27 - - TBS produced a hotel and a restaurant receipt to confirm this. On the 27th, he drove to Rhode Island and then to Connecticut to

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[8] Contradictory deposition statements by Schaller were explained by Schaller and others as due to nervousness at the deposition and severe pain in April 1985 due to an automobile accident.

deliver a speech. Late that afternoon, he returned to Lenox and immediately went to a sports banquet.

Hill denied helping plaintiff with the letter except to provide a Bible citation when asked by plaintiff. Hill never told plaintiff how to get Okabena to deliver the stock faster. She knew that plaintiff made six calls to Okabena but was only present at plaintiff's request.

With respect to keeping the gift confidential, Stevens felt that he should honor plaintiff's wishes. He, therefore, did not tell her family about the gift. He arranged for Jonas to be out of the house because he could tell that plaintiff had not told Jonas of the gift and did not want to do so. Stevens felt that plaintiff should do as God told her and that his first responsibility was to his communicant. He did not advise her either way about seeking outside advice. Baum told him that the gift was not proceeding quickly but he did nothing. He did not see plaintiff from April 11 until the gift was completed.[9] He did not know of the post office box until the litigation began.

The May 20 letter to plaintiff was a sincere letter which Stevens sent because of the continuing problems between Jonas and plaintiff. It was not a sham and neither Stevens nor Hill asked plaintiff to leave it where Jonas would find it. Stevens was not telling plaintiff in private anything that was contrary to what he said in the letter.

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[9] This testimony by Stevens is inconsistent with his other testimony that he met with plaintiff on April 30--when he arranged for Canino to take Jonas out to dinner, though he claims he played a much lesser role in those arrangements than plaintiff alleged.

An Active Interlude

PLAINTIFF'S TESTIMONY

Because of Okabena's breach of confidentiality (in telling her father of the planned $5,000,000 gift) and because Stevens suggested it to her, plaintiff decided to retain a new attorney, a new stockbroker and a new accountant. In June 1985, Stevens and Hill introduced plaintiff to Andrew Campoli, TBS' attorney. Stevens also introduced her to James Freed, a broker with Dean Witter Reynolds, Inc. (Dean Witter) who had been recently retained by TBS to be its broker (mainly to handle the $5,000,000 gift). Finally, plaintiff chose Rick Burkhart, TBS' accountant, to be her accountant. She chose all three based on Stevens' recommendations without delving into their qualifications.

From July to November 1985, plaintiff met with Campoli many times, always with Hill in tow. Some meetings were taped by plaintiff at Hill's request. Hill reported to Stevens all that occurred at the meetings. The two reasons for seeing Campoli were the drafting of a new will and the drafting of an agreement between Jonas and plaintiff.

The will was discussed for five months before plaintiff executed it on December 13, 1985. In the will, she left the bare statutory minimum to Jonas, with Stevens as trustee for most of

that. She left only her jewelry to her children.[10] Everything else went to TBS.

Stevens wanted her to get Jonas to sign an agreement after some unflattering newspaper articles appeared in a local paper, the Berkshire Eagle. The articles were a three-part series which reported allegations of dissension among former TBS members and pastors, improper actions by Stevens and other TBS members to get people to give money to TBS and eavesdropping by TBS. Hill was a major force in the drafting of the agreement--several drafts are in her handwriting. In pertinent part, the agreement stated that plaintiff would give Jonas $1,600,000 to do with as he wished, plaintiff would not make gifts from the principal of her estate without Jonas' consent, and plaintiff was leaving Jonas "an incredible amount" in her will.[11] Jonas in return was to stop harassing plaintiff about her gifts and her beliefs. Plaintiff signed the agreement on December 16; Jonas never did. Stevens told plaintiff that the part about not giving from principal was only to be for a short time.

Freed, plaintiff's new broker, communicated his thoughts about investing plaintiff's money to Stevens, but not to plaintiff, at Stevens' request. No one told her that Freed was also TBS' broker. Plaintiff's fortune was transferred from

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[10] Plaintiff sold all of her jewelry in November 1985 while on a trip to New York City with Hill. The proceeds were donated to TBS. Prior to her connection with TBS, plaintiff had already created two trust funds for her children with over $1,000,000 in them; these trusts were not affected by the will.

[11] This last provision was in obvious conflict with the will which was being prepared by Campoli.

Okabena to Dean Witter.[12] Freed advised her to sell all of her Dayton-Hudson stock and invest in higher income-producing items. She discussed the tax implications with both Freed and Burkhart, TBS' accountant. She sold the stock and incurred a large tax liability. At trial, she did not remember writing a letter to Freed in which she stated that she understood the tax implications of the sale and still wanted to go through with it. Jonas was never informed of the change to a new attorney and broker.

Between July and November, 1985, plaintiff gave TBS an additional $80,000 in a series of checks: $14,000 in July; $50,000 in September; $10,000 in October; and two checks for $4,000 and $2,000 in November. No evidence was introduced as to the events surrounding these gifts. Plaintiff also gave Stevens $10,000 in cash in November.[13]

DEFENDANT'S TESTIMONY

Witnesses for TBS gave the following account of the same events. Plaintiff asked Stevens for the names of Christian lawyers and brokers; she was very disturbed by Okabena's breach and wished to cut her ties with that organization. Stevens

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12 A portion was retained by Okabena in order for plaintiff to meet some limited partnership obligations that would come due in the future and that plaintiff could not avoid.

13 The bankruptcy court included the gifts to TBS in its judgment for plaintiff, it did not allow the $10,000 to Stevens because that was a personal gift to Stevens, not TBS. *See TBS I*, 73 B.R. at 870. Plaintiff has not appealed this exclusion.

supplied her with the name of an attorney he got from a born-again organization, but plaintiff chose Campoli on her own after meeting with him. Campoli is not a born-again Christian. Stevens thought that plaintiff knew Freed before he introduced them; he thought they had initially been brought together by another TBS pastor. Plaintiff chose Freed as a broker only after extensively questioning him about his qualifications while in Stevens' office.

Stevens knew nothing about plaintiff's new will. Any input from Hill was at plaintiff's request; plaintiff was a headstrong lady who insisted on things being done as she wished. Any taping of meetings was done at plaintiff's request. Neither Hill nor Campoli reported to Stevens about their meetings. Plaintiff sold only a small portion of her jewelry while in New York, mainly items she no longer wore. Giving Jonas a large sum of money was an old idea pre-dating plaintiff's joining TBS. The idea was originally an estate planning mechanism. Stevens was in favor of an agreement between Jonas and plaintiff as a last effort to save their marriage.

Plaintiff's account at Dean Witter required her approval on all transactions before they were made and Freed obtained her approval before any transactions were made. Stevens contended that he had no active role in plaintiff's account even though he lost $10,000 in options trading through the account.

Stevens was very concerned about plaintiff's marriage. In the Fall of 1985, he had meetings with plaintiff concerning her marriage and Jonas' family. On November 7, 1985, he suggested that she try to reach an agreement with Jonas in order to stabilize the marriage. He denied that the timing of

this suggestion was related to the publication of the Berkshire Eagle Articles a few days earlier. It was at this time that Stevens and TBS adopted a policy of not accepting gifts without the consent of both spouses. The new policy was not a reaction to the Berkshire Eagle Articles, but rather, was a further attempt to salvage plaintiff's marriage. Plaintiff was informed of this policy. Baum and others told Stevens that plaintiff was headstrong and would continue giving no matter what she was told. Because of this new policy, Stevens rejected a gift of two vans by plaintiff in the late Fall 1985. On November 22, plaintiff met with Stevens and told him that she would go through with the agreement. On December 10, Stevens and plaintiff met again; this time to discuss threats made against TBS and its members.

The $500,000 Gift

PLAINTIFF'S TESTIMONY

In December 1985, plaintiff decided to give another $500,000 to TBS. The genesis of this gift occurred as follows:

> Well, while Kathy Hill was living in my home, and Jonas was in Afghanistan, Kathy told me one day that she overheard a conversation while working in the business office between Bruce Dunbar and Jack Leonard. And Jack Leonard had been telling Bruce Dunbar that for the completion of phase two and for phase three to start, that the Bible Speaks needed $500,000 for T.V. equipment, and she told me that she

> overheard that, and he made me wait all day long to hear her tell me that.
>
> And I was beside myself about my relationship with Jonas, and when she told me that, I thought that if I gave $500,000, that that would solve my marriage problems, and she -- Kathy Hill wept and cried and thought that it was -- that's why she had overheard the conversation, so that I could give that money.

Plaintiff wrote a check on her Dean Witter account in that amount and a note stating that she had been led by God to make the gift. But Hill had other ideas:

> She [Hill] told me [plaintiff] that she thought that from now on whenever I gave money to the Bible Speaks that I must give it in a way so that Carl Stevens would never know about it. And so she investigated how I could give money so that there would be no record of it.

Hill and plaintiff then arranged for an anonymous $500,000 gift to TBS using a cashier's check. Plaintiff received no advice concerning this gift from anyone but Hill.

DEFENDANT'S TESTIMONY

TBS' witnesses presented another version of the same events. Stevens knew nothing about the $500,000 gift until this litigation began. In December 1985, plaintiff and Hill

approached Pastor Leonard and asked him how to make an anonymous gift. He suggested the use of a cashier's check. Plaintiff requested that Leonard tell Stevens to go on television but asked Leonard not to tell Stevens from where the funds for this were coming. Leonard honored her wishes and told Stevens as little as possible: he told Stevens that a gift would be coming but did not tell him the amount or who was making the gift. Leonard was the president of the Stevens Bible School but was not a trustee of the Church. He, therefore, did not know and had no reason to know of the new policy concerning spousal consent of gifts. Prior to the $500,000 gift, Leonard knew of TBS' policy of not accepting gifts from plaintiff's principal, and he knew that Stevens had rejected the gift of two vans by plaintiff. Leonard did not explain how two vans (worth approximately $40,000) would violate the policy against invading plaintiff's principal but a gift of $500,000 would not. The gift was not returned when Stevens learned of its source because litigation had begun and TBS needed the money as a defense fund.

The Denouement

Throughout the Summer and Fall of 1985, plaintiff's relationships with her friends and family continued to deteriorate. Her family was concerned about the changes in plaintiff. Her father saw her in Minnesota in the Summer and in Lenox in the Fall. Plaintiff's sister, a social worker, was very concerned after plaintiff and Hill visited her in New York in November 1985.[14] At that time, Hill was present at and active

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[14] This was the jewelry selling trip.

in most of plaintiff's conversations with her sister. Plaintiff specifically denied to her sister having given TBS any money.

The Berkshire Eagle Articles appeared in early November 1985. Jonas' father sent the articles to plaintiff's father who distributed them to other family members. At this point, the family, including Jonas after he returned from Afghanistan, decided that something had to be done. They arranged to have plaintiff examined by a psychiatrist without her knowledge while she was in New York in December.[15] They also decided to have plaintiff come to Minnesota without any TBS members on hand through the pretense of a surprise birthday party for her father.

On December 26, 1985, plaintiff and Jonas met with Stevens in his office. At this time, Jonas asked Stevens whether he had received any gifts from plaintiff since the $1,000,000 gift. Stevens response was to "slap [] his table, he had the Bible there, he said, 'Jonas, I swear before Jesus Christ and on the Bible that I have never taken any money from Betsy without your knowledge.'" Although Stevens' statement was not true, plaintiff believed it to be true.

The family's ruse worked: plaintiff and Jonas went to Minnesota without any TBS members accompanying them. Once there, a surprise birthday party was duly held at a house other

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[15] This examination was accomplished as follows. Plaintiff's sister hosted a musical evening at her apartment in New York and invited plaintiff and the psychiatrist, Dr. Halperin. After being introduced, the plaintiff and Halperin talked together for about forty-five minutes. Plaintiff did not know that Dr. Halperin was in fact examining her. In January 1986, Halperin examined plaintiff again, this time with her knowledge and consent.

than her family's. After the party, the family told plaintiff that they wished to talk to her and to introduce her to two other people. This was the beginning of the exit counselling or deprogramming.[16] After initial resistance, plaintiff began to accept the treatment, which consisted of talking to her family and the two exit counsellors and of viewing videotapes about cults and mind control groups. The turning point for plaintiff was when Jonas reminded her of the December 26, 1985 meeting with Stevens in which he swore he had taken no further gifts without Jonas' knowledge. When she realized that she had believed this patent lie, she decided that she needed help.

No one threatened plaintiff with the loss of her children or an incompetency hearing if she refused the exit counselling. Nor did anyone force plaintiff to remain in Minnesota. Her family wanted plaintiff to be able to think for herself; they were not interested in changing her religious beliefs.

After a week with her family, plaintiff and Jonas went to Unbound, an Iowa program, for more exit counselling before returning to Lenox. During this time, plaintiff drafted a new will and consented to a temporary conservatorship.

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16 Although there was some discussion on the difference between these two terms, the terms were used, for the most part, interchangeably at trial. For consistency, we will use the term used by the bankruptcy court--exit counselling.

III. MASSACHUSETTS LAW ON UNDUE INFLUENCE

In Massachusetts, "the elements necessary to prove undue influence [are]' (1) A person who can be influenced, (2) the fact of deception practiced or improper influence exerted, [and] (3) submission to the overmastering effect of such unlawful conduct.'" *Miles v. Caples*, 284 N.E. 2d 231, 235 (Mass. 1972) (quoting *Neill v. Brackett*, 126 N.E. 93, 94 (Mass. 1920)). "The nature of the undue influence that will invalidate a will or a transfer inter vivos is explained in *Neill v. Brackett*,... . As to either sort of instrument, the nature and effect of undue influence is the same." *O'Hearn v. O'Hearn*, 97 N.E. 2d 734, 735 (Mass. 1951). "[I]t generally takes less to establish undue influence" when a confidential relationship exists between the parties. *Heinrich v. Silvernail*, 500 N.E. 2d 835, 841 (Mass. App. Ct. 1986) (citing *Doggett v. Morse*, 12 N.E. 2d 867 (Mass. 1938)), *further review denied*, 503 N.E. 2d 665 (Mass. 1987); *see also Bruno v. Bruno*, 422 N.E. 2d 1369, 1372 (Mass. 1981) ("unfair persuasion in the context of a confidential relationship constitutes undue influence in Massachusetts"); *Neill*, 126 N.E. at 94 ("careful scrutiny" must be given to transactions involving fiduciaries or intimate parties). It is important to point out what we have decided this case assuming that there is *no presumption* of undue influence in such circumstances.[17] We

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[17] The district court cited *Barnum v. Fay*, 69 N.E. 2d 470 (Mass. 1946), for the proposition that "there is a presumption of undue influence when a gift is made pursuant to a confidential relationship." *TBS II*, 81 B.R. at 760. *Barnum*, however, dealt with the higher fiduciary relationship between an attorney and a client. *See also Markell v. Sidney B. Pfeifer Foundation, Inc.*, 402 N.E. 2d 76, 94 (Mass. App. Ct. 1980) (transactions with fiduciaries are "presumptively improper"). To reach the level of a fiduciary relationship, however, it must "manifest the

have assumed no more than that one in a confidential position has a duty to disclose facts which should be disclosed in light of the confidential relationship. *Markell v. Sidney B. Pfeifer Foundation, Inc.*, 402 N.E. 2d 76, 95 - 96 (Mass. App. Ct. 1980) (quoting *Reed v. A. E. Little Co.*, 152 N.E. 918, 920 (Mass. 1926)). This is a principle that would apply to religious and nonreligious circumstances alike. We also have strictly applied the legal rule that, the burden of showing undue influence is on the party seeking to avoid the transfers. *See Tarricone v. Cummings*, 166 N.E. 2d 737, 740 (Mass. 1960) (collecting cases).

Massachusetts has never directly addressed the question of whether a pastor-communicant relationship is *per se* a confidential one when undue influence is alleged.[18] We need

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relinquishment of control over financial affairs, the conferral of wide authority to act on important matters and make discretionary judgments, or the degree of reliance that usually lie[s] at the core of recognized fiduciary relationships... ." *Heinrich*, 500 N.E. 2d at 841 n.8. There has been no claim that Stevens or anyone else from TBS stood in a fiduciary relationship *vis a vis* plaintiff. The bankruptcy court refused to use a presumption because of the unsettled state of Massachusetts law in this area. *TBS I*, 73 B.R. at 859 (collecting cases and discussing issue). We adopt that court's statement that "the parties have tried this case without reference to presumptions, and we decide it without relying on any presumption." *Id.*

[18] The closest the Supreme Judicial Court has ever come is in *New England Merchants Nat'l Bank of Boston v. Mahoney*, 255 N.E. 2d 592, 595 (Mass. 1970), where the following is stated:

> J. Harold Mahoney's contention that Right Reverend Monsignor Enright exerted undue influence on and abused his confidential relationship with Dr. Mahoney does not require extensive discussion. No evidence was introduced concerning the relationship, other than that the men were friends, and that Dr. Mahoney was one of Monsignor Enright's parishioners. In addition, we note that the appointments to Monsignor Enright were not personal gifts.

not decide whether Massachusetts would hold that the pastor-communicant is by itself a confidential relationship. Here, we have found such a relationship on the basis of *other* factors alone such as the close contact between the parties in the context of their relationship, *Heinrich*, 500 N.E. 2d at 840 - 41, and knowledge by the recipient that the donor trusted or depend upon him, *Eddy v. Eddy*, 183 N.E. 268, 270 (Mass. 1932), and requests by the donor for the recipient's advice or help, *Doggett*, 12 N.E. 2d at 870.

"Undue influence, while sometimes susceptible of proof by direct testimony, may be exercised by indirect and secret ways, which are disclosed only in their result." *Raposa v. Oliveira*, 141 N.E. 870, 870 (Mass. 1924). Because undue influence is often practiced in "veiled and secret ways," its existence may be inferred from such factors as disproportionate gifts made under unusual circumstances, the age and health of the donor, and the existence of a confidential relationship. *Neill*, 126 N.E. at 94; *see also Eddy*, 183 N.E. at 269 (inexperience with financial matters and disposition of funds needed to generate sufficient income are facts to be considered); *Slater v. Munroe*, 55 N.E. 2d 15, 16 (Mass. 1944) (comparing size of questioned bequests to size of entire estate).

Two other factors are also important under Massachusetts case law. One, attempts by the recipient to isolate the donor from her former friends and relatives can be considered in determining undue influence. *See, e.g., Livermore v. Seward*, 41 N.E. 2d 290, 295 (Mass. 1942); *Smith v. Stratton*, 18 N.E. 2d 328, 330 (Mass. 1938); *Mirick v. Phelps*, 8 N.E. 2d 749, 751 (Mass. 1937); *Hoffman v. Hoffman*, 78 N.E. 492, 493 (Mass. 1906). Two, a court can "also consider that she [the donor] acted without independent and disinterested advice... ." *Old*

Colony Trust Co. v. Yonge, 18 N.E. 2d 335, 337 (Mass. 1938); *see also Tarricone*, 166 N.E. 2d at 741; *Israel v. Sommer*, 197 N.E. 442, 447 (Mass. 1935); *Raposa*, 141 N.E. at 871. Thus, the continuation of former relationships and the availability of independent counsel may help in counteracting an inference that undue influence played a role in the transactions.

In sum, "[a]ny species of coercion, whether physical, mental or moral, which subverts the sound judgment and genuine desire of the individual, is enough to constitute undue influence. Its extent or degree is inconsequential so long as it is sufficient to substitute the dominating purpose of another for the free expression of the wishes of the person [who gives]." *Neill*, 126 N.E. at 94. Nonetheless, "[t]here must be a solid foundation of established facts upon which to rest an inference of its existence." *Neill*, 126 N.E. at 94. And, "[t]he mere opportunity to exercise undue influence and the mere existence of a confidential relationship do not establish undue influence... ." *Eddy*, 183 N.E. at 270.

At trial, TBS stipulated that plaintiff was "susceptible", *i.e.* a person who could be influenced, thus conceding the first prong of the Massachusetts undue influence test. Our discussion, therefore, will focus on the second and third prongs of the test: deception practiced or improper influence exerted and submission to the unlawful conduct.

The $1,000,000 Gift

With these principles in mind, we turn to the first large gift made by plaintiff to TBS. Plaintiff testified that the idea for the $1,000,000 gift came to her as follows:

> Well, when we got back in the car, [on the way from Framingham to Lenox,] Carl Stevens said to me, "Betsy, it seems like you've really been hearing from the holy spirit." And when he said that, I got three thoughts in my head. One, two, three. And I said, "Yes, I really have been hearing the holy spirit." And in fact, I had my notebook out, and I turned on the little light in the backseat of his car, and I wrote down the three things that I heard in my head that I should do. And the first one was that I should get baptized. The second one was that my children should be dedicated in The Bible Speaks in a certain kind of ceremony that they do with children, and that I should give a million dollars to the Bible Speaks.

There is no evidence that making the gift was suggested by anyone at TBS or that anyone at TBS told plaintiff that she should give the money in order to cure Baum's headaches. That notion also originated with plaintiff. Stevens had told her that her mission was to give and that her gifts would affect great events; at this time, he did not, however, make any specific statements or suggestions.

There is no doubt that Stevens stood in a confidential relationship with respect to plaintiff. But, a confidential relationship even when combined with the opportunity to unduly influence a person does not prove undue influence. *Eddy*, 183 N.E. at 270. The actions of Stevens and others were not sufficient to give rise to an inference of undue influence. General statements by Stevens and others that plaintiff should give to TBS and that such gifts would do great works are too

amorphous to show undue influence. When the plaintiff told Stevens about her belief that the gift would cure Baum's headaches, his "nondisclosure" about this belief was not about a *fact*. A statement (or non-statement when there is a duty to disclose) about "conditions to exist in the future" is not a misrepresentation. *See Chedd-Angier Prod. Co. v. Omni Publications Int'l, Ltd.*, 756 F. 2d 930, 939 (1st Cir. 1985) (collecting Massachusetts cases). Stevens was under no duty to tell plaintiff that her gift would not cure Baum. At trial, Stevens was not asked whether he believed that the gift could cure Baum's headaches. The failure to disclose the fact that Baum's headaches were not in fact cured occurred *after* the gift was made and could have in no way influenced the gift.

This is not a case, as with subsequent gifts, where the plaintiff had already been misled by prior statements, or where she was convinced to give earlier than she planned to, nor is this an instance where a direct solicitation was made under circumstances where the plaintiff was emotionally isolated from all outside advice and believed her gifts could affect temporal events.

Here, plaintiff received advice from both Jonas and Okabena and she chose to ignore the advice. Plaintiff was in her thirties, in good health, and a college graduate. Plaintiff has failed to establish a "solid foundation" upon which to infer that undue influence was applied to effectuate the $1,000,000 gift. We hold that the courts below erred in finding that this gift was the result of undue influence.

The $5,000,000 Gift

Although the thought of making this gift originated with plaintiff, her decision to make it earlier than had been planned was determined by four factors, all of which were fashioned by TBS' agents. The first was the deliberate fostering by Stevens, Baum and Hill of plaintiff's belief that her gift of $1,000,000 had cured Baum's headaches. The fact was that the headaches continued and all three knew it. Plaintiff testified that, because she believed Baum's headaches had been cured, "I felt that my money had great power and I felt that -- I even became to feel that my money -- that in giving money to The Bible Speaks that I could change the course of history. I could change human history." Stevens fostered these thoughts: "He said that my money -- he said that when I gave money to The Bible Speaks that, that released God's judgment and that that judgment would show itself in cataclysmic events."

The second factor was Stevens' influencing plaintiff not to tell her husband or family about the gift. Plaintiff testified that when she told Stevens that she was going to give TBS $5,000,000 in June, he replied:

> Great. And then he said that he thought that Jonas should not know about this gift.
>
> ...
>
> He thought that it was really important that Jonas not know, because -- because satan was controlling Jonas, and he didn't believe that we should let the enemy know

> about this, because he thought that the enemy would try to stop this gift from happening. And he thought that Jonas would just be letting all the demons in hell loose if he were to know.

Plaintiff did not tell any member of her family of her intention to give TBS $5,000,000 because Stevens had told her that her family was evil and not to be trusted.

The third factor was the deliberate misrepresentation by Baum and Stevens that Turkia was being held in Rumania at great danger to his life. Plaintiff told Stevens in April that she wanted to give TBS the $5,000,000 immediately instead of in June as she had planned in order to effectuate Turkia's release. Stevens encouraged this and did not tell that Turkia had already been released and was in no danger.

The fourth factor was the letter Stevens prevailed upon plaintiff to write stating that the gift was prompted by God, and that no one from TBS asked her to make the gift or knew that she was going to make it. This last part was false. Stevens and Baum knew about the gift before it was made and accelerated its delivery.

These facts lead inexorably to a finding of undue influence. If plaintiff had been told that Baum's headaches had not been cured by her first gift of $1,000,000, she may not have made the second gift at all. If she had not been influenced to keep the gift a secret from husband and family, she may not have gone through with it. If she had been told that Turkia was in no danger, she probably would not have accelerated the gift. And the letter composed by Stevens, dictated by Hill and

written by plaintiff is damning evidence that Stevens and Hill knew they were engaging in improper conduct.

There was a solid foundation of evidentiary facts from which undue influence was properly found.

The $500,000 Gift

While plaintiff's husband was abroad and Hill was staying at plaintiff's home, Hill told plaintiff that she overheard a conversation between two TBS officials that $500,000 was needed for television equipment. Plaintiff was greatly concerned about her marriage and decided to give the money in an attempt to resolve her marital problems--having already been convinced that her gifts could effectuate such wishes. Rather than make the gift directly and openly, Hill prevailed upon plaintiff to make it anonymously and without other advice.

We agree with the lower courts that this gift was the result of undue influence. There was a not so subtle appeal for a large gift when plaintiff was concerned about her marriage, and Hill knew that plaintiff believed that large gifts could affect temporal events. The circumstances surrounding the gift were suspicious. At the time, TBS had pervasive control over plaintiff's business and legal affairs. The gift was made without outside advice at a time when the plaintiff was isolated from her non-TBS friends and relatives and when her husband was away.

The Small Gifts Totalling $80,000

Plaintiff introduced no evidence at trial with respect to the circumstances surrounding the $80,000 in checks she gave TBS in the Summer and Fall of 1985. TBS did not waive the need for separate proof as to each gift. While TBS' attorney admitted that, as a practical matter, these gifts did not make much of a difference, he nonetheless stated that "[i]t's all an issue and they have to make proof to any and all of it." Because of the dearth of evidence, plaintiff has failed to present a solid foundation of facts from which to find undue influence was the cause of these gifts. Neither court below offered an analysis or discussion of these gifts beyond noting their occurrence, *TBS II*, 81 B.R. at 753; *TBS I*, 73 B.R. at 856, and a conclusionary statement "that all of the [plaintiff's] gifts were the product of undue influence exercised upon her by the Church through Stevens," *id.* at 863 - 64. The rescission of these gifts must be reversed.

IV. The First Amendment Defense

TBS makes two arguments for invoking the protection of the first amendment. The first is that the statements and/or actions of Stevens and others that influenced the plaintiff to make the gifts are protected by the free exercise clause. Or to put it more broadly, the free exercise clause shields the solicitation of funds by a religious organization from attack; the gifts are sacrosanct. This argument invokes the protection of the free exercise clause for TBS.

The second argument, by contrast, seeks the protection of the free exercise clause for the plaintiff, the donor of the gifts. TBS argues that at the time the gifts were made, the only influence plaintiff was under was that of God and her religious beliefs or that even if the gifts were in part caused by improper influence by TBS agents, they were also the result of plaintiff's own sincerely held religious beliefs. In either case, the courts are precluded from inquiring into plaintiff's reasons for making the gifts.

We first determine whether the first amendment shields the acts of TBS agents from inquiry and attack. The free exercise clause reads: "Congress shall make no law... prohibiting the free exercise [of religion]...." The extent and limits of this constitutional guarantee have been delineated. In *Cantwell v. Connecticut*, 310 U.S. 296 (1940), the Court set aside a conviction for breach of the peace because it violated the petitioner's constitutional guarantees of religious liberty and freedom of speech. During the course of the opinion, the Court stated: "Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public." *Id.* at 306. The Court has made it clear that "[o]nly beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion." *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 713 (1981). The clause does not allow purely secular statements of fact to be shielded from legal action merely because they are made by officials of a religious organization.

> Non constat that we accept the breadth of defendants' deductions from the First Amendment cases, leading to their repeated assertions that their religious freedoms are being interfered with. Their case of *United States v. Ballard*, [322 U.S. 78 (1944)], merely holds that there can be no claim that a professed religious tenet was not honestly advanced. It does not hold that a religious organization may make such secular statements as it chooses in seeking contributions, so long as they serve a charitable purpose.

SEC. v. World Radio Mission, Inc., 544 F. 2d 535, 537 n.3 (1st Cir. 1976); *see also Van Schaick v. Church of Scientology of California, Inc.* 535 F. Supp. 1125, 1141 (D. Mass. 1982) ("The First Amendment protects utterances which relate to religion but does not confer the same license for representations based on other sources of belief or verification."); *id.* at 1140; *Molko v. Holy Spirit Ass'n for Unification of World Christianity*, 762 P. 2d 46, 64 - 65 (rescission of gift on undue influence grounds can be based on secular fraudulent statements concerning the nature of the organization one is joining, *reh'g denied & opinion modified*, 47 Cal. 3d 470a (Cal. 1988).

Neither our decision in this case nor the proceedings below implicates the religious tenets of TBS or the beliefs of its adherents. The findings and rulings rest solely on secular statements and actions. The facts relied upon have not been derived from an inquiry into the religious principles of TBS or the truth and sincerity of its adherents' beliefs. There has been no inquiry as to whether Stevens and the other TBS adherents were acting in accord with what they perceived to be the commands of their faith. *See Thomas v. Review Bd.*, 450 U.S. at

716. Those who run TBS may freely exercise their religion, but they cannot use the cloak of religion to exert undue influence of a non-religious nature with impunity. The five million dollar gift and the half million dollar gift might have had their seeds in the religious beliefs of plaintiff but they were both nurtured and brought to fruition by misstatements and distortions of facts that had no basis either in the religious tenets of TBS or the plaintiff's religious beliefs.

The second argument, which seeks to shield plaintiff's reasons for making the gifts from judicial examination, fails for two reasons. First, as already discussed, the court was not prevented by the first amendment from determining whether the secular reasons for making and accelerating the gifts was the result of undue influence. Second, the plaintiff has not claimed the protection of the first amendment. TBS may raise only its free exercise claims, not those of the plaintiff. *See Wisconsin v. Yoder*, 406 U.S. 205, 230 - 31 (1972) ("It is the parents who are subject to prosecution here for failing to cause their children to attend school, and it is their right to free exercise, not that of their children, that must determine Wisconsin's power to impose criminal penalties on the parent."). TBS cannot use plaintiff's former religious beliefs as a shield against plaintiff's claim of undue influence.

We find, as did the courts below, that the free exercise clause to the first amendment is not implicated.

The other issues raised by defendant have been considered but do not merit discussion.

APPENDIX A

[Judgment and Opinion - USCA (1st Cir. 1989)]

SUMMARY

The rescission of the gift of one million dollars is reversed.

The rescission of the gifts totalling $80,000 is reversed.

Affirmed in part, reversed in part.

No costs to either party on appeal.

The motion of April 12, 1988 by plaintiff to dismiss this appeal on the grounds that TBS has no standing to appeal is denied.

APPENDIX B - MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [PP. 48a - 83a]

United States District Court

DISTRICT OF MASSACHUSETTS

THE BIBLE SPEAKS,
Debtor-Appellant

v.

APPEAL NO. 87-0124-F

ELIZABETH DOVYDENAS,
Claimant-Appellee

MEMORANDUM AND ORDER

January 25, 1988

FREEDMAN, C.J.

I. INTRODUCTION

This is an appeal from a final order of the bankruptcy court pursuant to 28 U.S.C. §158. This Court, having reviewed the entire record, accepts and adopts in full the bankruptcy court's findings of fact in *In re The Bible Speaks*, 73 B.R. 848

(Bankr. D. Mass. 1987). Only those facts necessary for understanding the discussion of law are summarized below.

II. FACTS

Elizabeth Dayton Dovydenas ("Elizabeth Dovydenas," "claimant") is a college graduate in her mid-thirties. The Bible Speaks ("TBS," "appellant," "debtor") is an evangelical fundamentalist church formerly located in Lenox, Massachusetts. The church's pastor, president, chief executive, and chief operating officer is Carl H. Stevens ("Stevens") who founded the church in 1973.

Elizabeth Dovydenas is an heir to a substantial fortune, with a net worth of $19 million, and is married to Jonas Dovydenas. In 1982, Elizabeth Dovydenas began attending services at TBS. She became increasingly involved in the church and became close friends with Stevens, his wife Barbara Baum Stevens, and a church employee Cathy Hill ("Hill"). *Id.* at 850.

By fall 1984, TBS and the Stevenses had become important parts of Elizabeth Dovydenas' life. The bankruptcy court found that during that time, "Stevens told her, in substance, on numerous occasions that: giving money to the church was her primary mission on earth; all she needed to live on was $1 million, and the rest should be given to the church; she should not be influenced by her husband, or her parents, sisters or advisors, because they have not been born again through the church and are therefore controlled by the Devil, and her money gave her power to release God's judgment in order to effect miracles." *Id.* at 851. The bankruptcy court also found that the claimant accepted and believed all of this. *Id.*

In November, 1984 Elizabeth Dovydenas gave her first large gift to the church. Stevens' wife Barbara suffered from severe migraine headaches and, based on what Stevens had told her about the power of her money, Elizabeth Dovydenas told Mr. and Mrs. Stevens that she heard "a message from God that she should give $1 million to the church in order to cure [Mrs. Stevens'] migraine headaches." *Id.* at 851. The Stevenses urged her to do so. Elizabeth Dovydenas then effected the transfer by contacting the family's financial advisor, Okabena Company ("Okabena"), located in Minneapolis. Okabena suggested that for tax purposes she not give the money in a lump sum. Jonas Dovydenas also counselled his wife against donating the money, but Stevens told her not to listen to her financial advisor or her husband since they were motivated by the devil. After receiving Elizabeth Dovydenas' gift, Stevens told her that his wife's migraines were cured. This reinforced Elizabeth Dovydenas' belief that, as the bankruptcy court stated, "she was a special person anointed by God to promote good through gifts of her money to the church." *Id.* at 852. Stevens hid from Elizabeth Dovydenas the fact that his wife continued to suffer from migraines and was hospitalized for treatment in January of 1985. *Id.*

In early April 1985, Elizabeth Dovydenas told Stevens that she heard another message from God telling her to give $5 million to the church. Stevens counselled her not to tell anyone, especially her husband. Soon after their conversation, Jonas and Elizabeth Dovydenas went to Florida on vacation. Mrs. Stevens called Elizabeth Dovydenas there on April 18 to inform her that one of the church's pastors, Benjamin Turkia, was being detained by border officials in Rumania. She asked Elizabeth Dovydenas to pray for him and told her "[t]hey are probably

pulling out his fingernails right now." *Id.* at 852. Actually, Turkia had been released the day before and immediately sent word to his wife who was staying with a TBS employee in Lenox, Massachusetts while her husband was gone. On April 21, five days after Turkia's release, Elizabeth Dovydenas, still believing Turkia was in captivity, called Stevens to say she wanted to donate her $5 million immediately so as to release God's power on behalf of obtaining Turkia's release. Again, according to the finding of the bankruptcy court, Elizabeth Dovydenas believed that she had the power from God to obtain Turkia's release by giving money to TBS. Stevens, who knew Turkia had already been released, told her: "Good. Get a jump on the Devil." *Id.* at 852. Elizabeth Dovydenas learned on her return that Turkia was free and she was encouraged by Stevens, Mrs. Stevens, and Hill to think that it was her pledge which freed him.

The events which followed constituted an elaborate effort on Stevens' part that no one dissuade Elizabeth Dovydenas from giving her $5 million gift. The bankruptcy court found that Stevens told her to write a letter stating her gift was voluntary and later on April 28, Hill dictated the letter to Elizabeth Dovydenas. *Id.* at 853. He told her not to tell her husband about the gift. He also told her to rent a post office box so her husband would not see the mail from Okabena, and he coached her to be aggressive in talking to Okabena. Later, after learning of his daughter's prospective gift, Dovydenas' father telephoned her to dissuade her from carrying out her plan. *Id.* Stevens told her to lie to her father and arranged for her husband to be taken out to dinner so that he would not overhear the conversation between Elizabeth Dovydenas and her father. *Id.* Finally, after the $5 million gift was executed, Stevens began a program which resulted in Elizabeth Dovydenas

transferring her assets to a broker loyal to TBS, firing her lawyer, and drafting a new will with TBS' own lawyer which left substantially all her wealth to the church at the expense of her husband and children. Seven individuals associated with the church were made executors and Hill was made guardian of Elizabeth Dovydenas' children in the event Elizabeth Dovydenas' husband predeceased her. *Id.* at 854 - 55.

Following the $5 million gift, a number of other gifts were made in relatively small amounts. One gift was given according to a plan orchestrated by Stevens in which Stevens told Elizabeth Dovydenas to make out a cashier's check for $500,000 and then deliver it to Hill with a typed unsigned note. After that, Elizabeth Dovydenas made gifts of $14,000 in July 1985, $50,000 in September 1985, $10,000 in October 1985, and $4,000 and $2,000 in November of 1985. She also personally gave Stevens $10,000 in cash in November 1985. *Id.* at 856.

In December 1985 Elizabeth Dovydenas' family, alarmed by the changes in her personality, invited her to Minnesota. When she arrived, her family arranged for her to meet with two exit counselors who "spoke to her about the psychological aspects of organizational membership." *Id.* at 857. After a few weeks, Elizabeth Dovydenas "gradually came to her senses about Stevens." *Id.* at 857. She consented to a temporary conservatorship, made a new will leaving her estate to her husband and children, and returned to Lenox.

APPENDIX B

Memorandum and Order [D. Mass. 1988]

III. PROCEDURAL HISTORY

TBS brought suit in Berkshire Superior Court against Elizabeth Dovydenas on April 14, 1986 seeking a declaratory judgment that it did not owe her any debt or liability and that it did not have to return funds transferred by her. This suit was dismissed on June 13, 1986. The Massachusetts Appeals Court dismissal was affirmed on April 8, 1987.

Elizabeth Dovydenas then brought suit on June 19, 1986 in Berkshire Superior Court against TBS. She sought rescission of gifts made by her between December 1984 and December 1985 because of undue influence and fraud. After its motion to dismiss was denied on July 15, 1986, TBS sought protection of the bankruptcy court filing for Chapter 11 reorganization on July 29, 1986. Its petition, which stayed the state court action, stated that Elizabeth Dovydenas' claim against it was a core proceeding. Elizabeth Dovydenas then filed a proof of claim with the bankruptcy court on October 31, 1986. The three-week trial on the merits began on March 30, 1987 and ended on April 16, 1987. The bankruptcy court issued its final order on May 19, 1987. By assuming jurisdiction of TBS over the claimant's objection, the bankruptcy court entered into the process of administering TBS' estate while it reorganized under Chapter 11. The matter is now before this Court on appeal from the bankruptcy court's final order pursuant to 28 U.S.C. § 158.

IV. DISCUSSION

This action is a claim by Elizabeth Dovydenas against TBS for the $6,581,356.25 which she states she gave while a victim of undue influence. Although one of the parties to this action is a church, and the other a former member of a church, the dispute is purely secular. For reasons which will be detailed below, this Court has made no inquiry into the validity of the debtor's religious doctrine. Nor is this an action by a disgruntled member of a religious sect claiming that she was induced to join a false religion. *See Molko v. Holy Spirit Associate for the Unification of World Christianity*, 179 Cal. App. 3d 450, ___P. 2d___, 224 Cal. Rptr. 817 (1986), re-reported *Molko v. Association*, (1986, 1st Dist.) 188 Cal. App. 3d 49, *review granted*, (court cannot assess reasonableness of church's belief in order to adjudicate claim by former members that they were manipulated to accept church's beliefs). Rather, despite appellant's attempts to make it seem otherwise, this is an ordinary undue influence action brought pursuant to a claim in bankruptcy against a debtor's estate. This Court, sitting here as an appellate court, will address sequentially the three major components of the case: the standard of review, undue influence, and the application of the first amendment. It will also review a motion for summary judgment brought by the debtor.

A. STANDARD OF REVIEW

Appellant asks this Court for a *de novo* review of the law and the facts found by the bankruptcy court. This Court is

obligated to conduct a *de novo* review of law. *Molerio v. Federal Bureau of Investigations*, 749 F. 2d 815, 820 (D.C. Cir. 1984). A trial court's findings of fact, however, are usually reviewed on a "clearly erroneous" standard so that they will only be set aside if the trial court was "clearly erroneous." *Id.* Bankruptcy Rules 7052 and 8013 confer upon the findings of a bankruptcy court the same standard on review as Rule 52 of the Federal Rules of Civil Procedure accords the findings of a district court on appellate review: that findings of fact must be upheld unless "clearly erroneous." Nonetheless, a claim which is identified as a non-core proceeding allows for a *de novo* review of the factual findings of the bankruptcy court. Appellant raises a series of arguments on appeal which, in direct contrast to its arguments before the bankruptcy court, attempt to achieve *de novo* review of the bankruptcy court's findings of fact by identifying Elizabeth Dovydenas' claim against TBS as a non-core proceeding.

Because this Court sits as an appellate court, it will not consider arguments raised on appeal which were not raised below. *Singleton v. Wulff*, 428 U.S. 106 (1976) (general rule is that a federal appellate court does not consider an issue not passed on below); *Rowlett v. Anheuser-Busch, Inc.* 832 F. 2d 194, 201 n.4 (1st Cir. 1987) (issues not raised at trial not properly before appellate court); *Johnson v. Holiday Inns, Inc.*, 595 F. 2d 890 (1st Cir. 1979). The appellant's attempt to do so here is especially inappropriate since it successfully sought jurisdiction in the bankruptcy court by arguing strenuously that Elizabeth Dovydenas' claim was a core proceeding. On August 15, 1986 TBS filed a motion entitled "Motion of Debtor Seeking an Evidentiary Hearing on All Issues Raised by Dovydenas August 11, 1986 Motions and Opposition Thereto." In it, appellant argues that the bankruptcy court should assume jurisdiction of

the claim because it could provide quick and final adjudication. It argued, *inter alia*, that the proceeding was core stating that "if [Elizabeth Dovydenas] does not file a timely proof of claim, the Debtor will file a proof of such claim (§ 501 (c)) for the purpose of filing an objection to such claim (§ 502(b)). The proceedings upon an objection to a claim is [sic] a 'core proceeding' pursuant to 28 U.S.C. § 157 (b) (2) (B)." Motion at 2. The bankruptcy court granted TBS' motion asserting that it had jurisdiction to "quickly and simply" render a final decision. *In re the Bible Speaks*, 65 B.R. 415, 427 (Bankr. D. Mass. 1986). Only after losing in the bankruptcy court is appellant attempting to change its characterization of the matter as non-core.

Even if this Court were inclined to consider arguments raised for the first time on appeal, appellant's arguments are without merit. Nevertheless, this Court will review appellant's arguments as they exhibit many serious misinterpretations of modern bankruptcy law. In short, appellant makes three arguments as to why this Court should engage in *de novo* review of the bankruptcy court's findings of fact: first, the matter is non-core because it considers a principle of state law; second, the matter is non-core because the bankruptcy court made findings of fact about persons other than the claimant and debtor; and third, the matter is non-core because the debtor, as a church, has a first amendment right to review by an Article III court.

1. The Claim is a Core Proceeding Even Though it Considers a Principle of State Law

As stated above, appellant cannot argue that Elizabeth Dovydenas' claim is non-core having achieved the jurisdiction of

the bankruptcy court by arguing that it was a core proceeding. Not only is this argument barred by the conventions of appellate procedure, it is also incorrect. Elizabeth Dovydenas' claim against TBS is a classic claim against a debtor's estate. Indeed, hers is the major claim against the debtor's estate. As such, it is specifically listed by statute as an example of a core proceeding. 28 U.S.C. § 157 (b) (2) (B).

Appellant's argument, apparently stemming from a misreading of *Northern Pipe Line Co., v. Marathon Pipeline Company*, 458 U.S. 50 (1982), is that because Elizabeth Dovydenas' claim is based on the state law principle of undue influence, it is not a core matter. *Marathon* is a landmark bankruptcy case questioning the constitutionality of the broad powers granted the bankruptcy courts by the 1978 Bankruptcy Act. The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598 (the "1978 Act"). Specifically, *Marathon* held that the resolution of a state law action owned by the debtor was not a core proceeding. *Marathon* did not, however, have the dramatic effect ascribed to it by the appellant.

This Circuit, following the lead of the Supreme Court in *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568 (1985), construes *Marathon* narrowly. *See in re Arnold Print Works, Inc.*, 815 F. 2d 165, 169 (1st Cir. 1987). The mere fact that a claim asserts state law does not make it non-core. *Id.* The First Circuit stated that "[t]he fact that a claim in a bankruptcy matter raises issues of state, rather than federal law does not by itself determine that it is non-core, rather than core. A claim [for example] by a creditor for money owed by the debtor . . . might depend entirely upon . . . state law . . . ." *Id.* at 169. Even appellant admits that Elizabeth Dovydenas' claim

"arguably fits within the literal wording of the [statutory] definition of core proceedings." Appellant's Brief at 44.

This Circuit has also held, specifically, that the "clearly erroneous" standard of review is constitutionally permissible after *Marathon*. In *Briden v. Foley*, 776 F. 2d 379 (1st Cir. 1985), the First Circuit rejected an argument that *Marathon* required the stricter *de novo* standard of review. The court held that "Bankruptcy Rules 7052 and 8013, which require the application of the clearly erroneous standard to a bankruptcy court's findings of fact, are constitutional as applied to core proceedings .... The Supreme Court's decision in [*Marathon*] casts no doubt on this conclusion." *Briden*, 776 F. 2d at 381. *See also In re Shop-n-Go of Maine, Inc.*, 38 B.R. 731 (Bankr. D. Maine 1984). Since Elizabeth Dovydenas' claim is a core matter and since findings of fact in core matters are by law reviewed according to the "clearly erroneous" standard, appellant's claim for *de novo* review is contrary to law.

2. Elizabeth Dovydenas' Claim is a Core and Not a "Related To Proceeding" even though the Bankruptcy Court Made Findings of Fact Regarding Persons Other than Claimant and Debtor

Appellant contends that because the bankruptcy court made findings of fact regarding persons other than the claimant and the debtor, it converted the claim into a "related to proceeding" which is reviewed as a non-core proceeding pursuant to 28 U.S.C. § 1334 (2) and is the subject of special procedures contained in 28 U.S.C. § 157 (c) (1). *See* Collier on Bankruptcy, ¶ 3.01 [1] [c] [iv-v] (15th ed. 1987). Briefly, "related to

proceedings" are "those which (1) involve causes of action owned by the debtor that become property of the estate under section 541, and (2) suits between third parties which in one way or another affect the administration of the title 11 case." *Id.* at 3.01 [1] [c] [iv]. Appellant's argument appears to be based on the bankruptcy court's finding of fact that Carl Stevens, aided by his wife and Cathy Hill, exerted undue influence on Elizabeth Dovydenas. Since these findings were about persons other than the claimant and debtor, argues appellant, they were only "related to" the action between the claimant and the debtor.

This argument defies common sense. The bankruptcy court assessed no liability against Stevens, his wife, or Cathy Hill. Nor did it award relief to any person except the claimant Elizabeth Dovydenas. In fact, the bankruptcy court specifically declined to include in Elizabeth Dovydenas' recovery a $10,000 gift which Elizabeth Dovydenas made personally to Carl Stevens. Instead, the only recovery allowed was of money given by the claimant, Elizabeth Dovydenas, to the debtor, TBS.

Having noted above the Supreme Court's decision in *Thomas*, and the First Circuit's interpretation in *Arnold*, which avoid construing *Marathon* as barring core proceedings based in state law, this Court sees no barrier to permitting the bankruptcy court to make findings of fact regarding a state law claim between a debtor and claimant. Since Elizabeth Dovydenas' claim of undue influence is based on the actions of Stevens, aided by his wife and Hill, in his official capacity as an officer of TBS, it was essential for the bankruptcy judge to determine how Stevens' statements to Elizabeth Dovydenas and her husband, contributed to his exercise of undue influence. *See infra* at 18 - 25. Thus, the bankruptcy court's findings of fact

were directed at the claim between claimant Elizabeth Dovydenas and debtor TBS. This was not a "related to proceeding."

Finally, appellant's argument attempting to separate findings of fact about Stevens from findings of fact about TBS is really a claim that because the debtor is a corporation, any finding regarding the actions of humans is a "related to" rather than a core proceeding. This argument ignores the most basic principle of corporate law which is that a corporation acts through human agents. *Holmes v. Bateson*, 583 F. 2d 542, 560 (1st Cir. 1978). The corollary to this is that a corporation is liable for acts committed by its agents on the corporation's behalf. *United States v. Petus*, 732 F. 2d 1004, 1008 (1st Cir. 1984) (citing *United States v. Hartley*, 678 F. 2d 961, 970 (11th Cir. 1982)). Thus, in every case where a corporation is the debtor, the bankruptcy court must make findings regarding the actions of human agents. For example, when evaluating promissory notes, the bankruptcy court must always make a finding regarding the human who signed the note. It is not disputed that Stevens was an agent of TBS. Nor can it be disputed that his acts were intended to benefit TBS by providing it with money. Indeed, the bankruptcy court in its ruling distinguished between the $10,000 gift which Elizabeth Dovydenas gave Stevens personally and the $6,581,356.25 which she gave him in his capacity as an agent for TBS by excluding the $10,000 gift from Elizabeth Dovydenas' recovery. If this Court accepted appellant's argument that any findings of fact except those concerning claimant and debtor are "related to proceedings," then it would be impossible for any action against a corporate debtor to be a core proceeding. Such is obviously not the intent of Congress and will not be adopted by this Court.

3. The *Bose* Decision is Not Applicable

The Appellant's third argument for characterizing Elizabeth Dovydenas' claim as non-core is based on a misreading of the Supreme Court case, *Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984). Appellant claims that the bankruptcy court's findings of fact which led it to conclude that TBS had exerted undue influence were based on false statements made by Elizabeth Dovydenas. Appellant cites *Bose* for the proposition that cases raising first amendment issues should be subject to *de novo* rather than the clearly erroneous standard of review. Thus, it concludes, this Court should review *de novo* the bankruptcy court's decision to find that Elizabeth Dovydenas' statements regarding the actions of Stevens, his wife, and Cathy Hill were true.

In *Bose*, a manufacturer of loud speakers sued the publisher of a consumer magazine for "product disparagement." The district court found that there was a first amendment issue at stake but held that in order to recover, the manufacturer would have to prove actual malice on behalf of the magazine. *Bose Corporation v. Consumers Union of United States, Inc.*, 508 F. Supp. 1249, 1270 (D. Mass. 1981). The First Circuit, however, reversed the district court after a *de novo* review of the district court's conclusions of law, not its findings of fact. *Bose Corporation v. Consumers Union of United States, Inc.*, 692 F. 2d 189, 195 (1st Cir. 1982) ("[W]e recognize that we are in no position to reconsider the credibility of witnesses and must leave questions of demeanor to the trier of fact"). The Supreme Court then affirmed the First Circuit, writing that in libel cases requiring a finding of actual malice for recovery, as outlined in

New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the appellate court has a duty to make a *de novo* review of the trial court's legal conclusion. *Bose*, 466 U.S. at 498 - 501.

This narrow holding does not alter Rule 52 of the Federal Rules of Civil Procedure which calls for appellate courts to exercise the "clearly erroneous" standard when reviewing findings of fact by the trial court. *Id.* at 498 - 99. The Supreme Court in *Bose* specifically stated that "our standard of review must be faithful to both Rule 52 (a) and the rule of independent review applied in *New York Times v. Sullivan.*" *Bose*, 466 U.S. at 499 - 500. Moreover, the Supreme Court minimized the effect of its holding on Rule 52 by stating that the appellate court must always review the entire record in order to make its determination whether or not the trial court's findings of fact were "clearly erroneous." *Id.* at 500. Finally, the Supreme Court noted:

> Rule 52(a) commands that 'due regard' shall be given to the trial judge's opportunity to observe the demeanor of the witnesses; the constitutionally based rule of independent review permits this opportunity to be given its due. Indeed, as we previously observed, the Court of Appeals in this case expressly declined to second-guess the District Judge on the credibility of the witnesses.
>
> *Id.* at 499 - 500.

Nothing in *Bose* then warrants the appellant's claim that the facts in any case which might raise a first amendment issue must be reviewed *de novo.* It is the job of the bankruptcy court, as the trier of fact, to determine which of Elizabeth Dovydenas' statements were or were not to be believed. To the

extent that the bankruptcy court's findings are not clearly erroneous, they must be adopted by this Court in making its review of the law.

Unconvinced by appellant's arguments, this Court finds that the bankruptcy court's decision in *In re the Bible Speaks* was a final decision of a core matter and thus subject to Bankruptcy Rule 8013's "clearly erroneous" standard of review. This is consistent with Fed. R. Civ. P. 52 (a). The clearly erroneous standard is especially appropriate here because the court's findings rest, to a great extent, on demeanor evidence and evaluation of a witness' credibility rather than documentary evidence. The First Circuit recently held that regarding the credibility of witnesses, "no subject matter is more clearly within the exclusive province of the fact-finder." *O'Brien v. Papa Gino's of America, Inc.*, 780 F. 2d 1067, 1076 (1st Cir. 1986). The court wrote further that "questions of credibility are factual findings that must on appeal be resolved in favor of affirming the trial court's findings, unless shown to be clearly erroneous." *Id.* at 1076 (citing *United States v. United States Gypsum*, 333 U.S. 364 (1948)).

Thus, after conducting a careful review of the record and of the bankruptcy court's findings, this Court concludes that the bankruptcy court's findings of fact are not clearly erroneous and must be affirmed. The facts set out in the beginning of this Memorandum and Order, then, are merely a summary and do not supplant the bankruptcy court's findings of fact. The bankruptcy court's findings of fact are based on oral testimony and documentary evidence. It found Elizabeth Dovydenas and her husband to be "forthright and credible." 73 B.R. at 857. It found the testimony of Stevens, his wife, and Hill to be "evasive

and lacking in credibility [which] . . . conflicted with much undisputed documentary evidence." *Id.*

Given that the bankruptcy court's findings of fact are not clearly erroneous, this Court must next conduct a *de novo* review of its findings of law. *In Re Mazzola*, 23 B.R. 263 (Bankr. D. Mass. 1981).

B. UNDUE INFLUENCE

Elizabeth Dovydenas claims that she was under undue influence when she gave money to TBS. Facts found by the bankruptcy court support a conclusion that claimant Elizabeth Dovydenas' gift was motivated by undue influence on the part of the debtor. Federal courts must apply the substantive law of the state except in matters governed by the federal constitution or acts of Congress. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Since there is no federal law of undue influence, Massachusetts law applies. In order to succeed in a claim of undue influence in Massachusetts, the leading cases hold that the burden is on the donor to prove that 1) she was susceptible to undue influence; 2) undue influence was exerted; and 3) she submitted to the overmastering effect of such undue influence. *Miles v. Caples*, 362 Mass. 107, 284 N.E. 2d 231 (1972); *Neill v. Brackett*, 234 Mass. 367, 370, 126 N.E. 93, 94 (1920). In *Bruno v. Bruno*, 384 Mass. 31, 442 N.E. 2d 369 (1981), the Supreme Judicial Court further defined undue influence as "unfair persuasion of one party under the domination of another . . . [which] seriously impairs the free and competent exercise of judgment" by the donor. *Id.* at 34. After making a careful review of the record and of the law, this Court is satisfied that

the bankruptcy court found facts which are legally sufficient to satisfy the three-prong test of undue influence in *Neill*.

1. Susceptibility to Undue Influence

The bankruptcy court found that the parties stipulated to Elizabeth Dovydenas' susceptibility to influence during an *in camera* proceeding before the bankruptcy judge on April 8, 1987. Transcript of In Camera Proceedings, April 8, 1987 ("Tr.") at 9. The stipulation was not objected to by either party either before the bankruptcy court or on appeal. According to the transcript made available to this Court, the bankruptcy judge read the following stipulation into the record: "The parties stipulate that Elizabeth Dovydenas was at relevant times with respect to the various gifts, donations in dispute, susceptible to influence as that concept is used in the Massachusetts cases, such as *Neill* . . . and others, with respect to the threshold element of an undue influence case." Tr. at 9-11.

According to the transcript, the stipulation was intended to forestall lengthy psychiatric testimony regarding Elizabeth Dovydenas' susceptibility to influence. Appellant argues, and this Court agrees, that a stipulation that Elizabeth Dovydenas was susceptible to influence does not mean that she was, in fact, influenced. It merely establishes the first prong of a three prong test.

2. Exertion of Undue Influence

The second part of the test for undue influence asks whether the influence was, in fact, exerted. To satisfy this part

of the test, appellee must show both that influence was exerted and that the influence exerted was undue.

a. Was Influence Exerted?

Appellant challenges the claim that Stevens influenced Elizabeth Dovydenas to give money to TBS. Appellant contends that the following facts controvert the bankruptcy court's conclusion that influence was exerted on Elizabeth Dovydenas: she initiated the gifts to TBS, decided their amounts, gave the $1 million gift before she heard Mrs. Stevens' migraines were cured, and was in Florida when she decided to give the $5 million to free Turkia. Appellant has also requested that this Court weigh the bias of the witnesses who testified regarding influence exerted on Elizabeth Dovydenas as to the likelihood of their telling the truth. This Court, however, will only review whether the bankruptcy court's findings of fact that Elizabeth Dovydenas was the object of influence by TBS were clearly erroneous. Again, this Court will not usurp the bankruptcy court as the finder of fact by weighing the "bias" of witnesses or the likelihood of their telling the truth as appellant has requested.

Despite appellant's arguments that Stevens did not directly tell Elizabeth Dovydenas to give money to TBS, the bankruptcy court's conclusion remains that Stevens did tell her that "giving money to the church was her primary mission on earth; all she needed to live on was $1 million and the rest should be given to the church; she should not be influenced by her husband, or her parents, sisters or advisors, because they have not been born again through the church and are therefore controlled by the devil, and her money gave her the power to release God's judgment in order to effect miracles." 73 B.R. at

851. Thus, regardless of whether Stevens directly made requests for money from Elizabeth Dovydenas, the facts as found by the bankruptcy court support a conclusion that TBS did influence Elizabeth Dovydenas' decision to donate. Even if Stevens did not originate the idea that her money could change events in the outside world, he confirmed her belief that it could, even though this was not one of his religious beliefs. *See infra* 28-29. On two notable occasions Stevens reinforced Elizabeth Dovydenas' conviction that money could influence events. First, Stevens told Elizabeth Dovydenas that she cured his wife's migraines. Second, he told Elizabeth Dovydenas that she effectuated Turkia's release when he knew that her money had not done either thing. In this way, his behavior influenced Elizabeth Dovydenas' decision to give money to TBS even though he did not explicitly appeal to her for donations. For these reasons, this Court finds that Stevens exerted influence on Elizabeth Dovydenas.

b. Was Influence Undue?

According to Massachusetts law, there is a presumption of undue influence when a gift is made pursuant to a confidential relationship. *Barnum v. Fay,* 320 Mass. 177, 181, 69 N.E. 2d 470 (1946). A variety of relationships have the potential for control that justify a characterization of "confidential" relationships. They include relationships with the donor's attorney, guardian, spouse, friend, and psychiatrist as well as clergyman. Clark, *Gratuitous Transfers*, 249-252 (1986). While the bankruptcy court did not rely on presumptions, presence of a confidential relationship remains strong evidence of the exertion of undue influence.

Following the Restatement of Trusts, Massachusetts courts have held that a confidential relationship exists between persons when one person has confidence and trust in the other and the influence that grows out of that trust and confidence is possessed by the other. *Markell v. Sidney B. Pfeifer Foundation, Inc.*, 9 Mass. App. 412, 444, 402 N.E. 2d 76, 94 - 96 (1980). Because of the high level of trust endowed a person who has a confidential relationship with regard to another, that person has a duty of honesty and full disclosure in business transactions. He is also "liable for concealing facts which by reason of the relationship he should disclose." *Reed v. A.E. Little Co.*, 256 Mass. 442, 449, 152 N.E. 918 (1928). The bankruptcy court found that Stevens was Elizabeth Dovydenas' spiritual advisor. It also found that their relationship was a close one and that she spent considerable amounts of time with Stevens. Moreover, the bankruptcy court found that she took Stevens' advice on many topics, such as "[m]arital, family, social, personal and financial" matters not relating to the church. 73 B.R. at 860. These facts are more than sufficient to constitute a confidential pastor/parishioner relationship.

While there is no one factor which establishes undue influence, considered together, the facts found by the bankruptcy court satisfy the legal requirements. Stevens was Elizabeth Dovydenas' pastor. She was a loyal and devoted member of the church. The bankruptcy court found that Stevens told her that her money granted her special status. *Id.* at 863. If he did not inculcate, then he reinforced her beliefs that her gifts could alter events in the world such as curing Mrs. Stevens' migraine headaches. The danger of a confidential relationship is not confined, as appellant claims, to situations in which the pastor turns his parishioner into a zombie or automaton. Rather, the

law recognizes the danger of undue influence in the pastor/parishioner relationship because of the trust instilled.

Another important factor in determining whether the influence is undue is an attempt by the influencer to isolate the donor from outside sources of advice. The Supreme Judicial Court of Massachusetts, in deciding a case of undue influence, noted that one of the factors in determining whether or not a friend of an elderly woman exerted undue influence was that "he discouraged her from having relations with her next of kin and told her that 'her relatives didn't care for her as much as he '" *Mirick v. Phelps*, 297 Mass. 250, 253, 8 N.E. 2d 749 (1937). This is consistent with the bankruptcy court's finding that Stevens isolated Elizabeth Dovydenas from her husband and family by telling her that they were motivated by Satan. He also advised her against consulting her independent lawyers and financial advisors. *Mirick*, 297 Mass. at 253. "Eventually, he succeeded in replacing them with advisors who owned their primary loyalty to him rather that the claimant." 73 B.R. at 854 - 55. These factors lead this Court to conclude appellant unduly influenced Elizabeth Dovydenas.

3. Did Elizabeth Dovydenas Submit to the Overmastering Effect of Undue Influence Exerted by Carl Stevens?

Having concluded that Elizabeth Dovydenas was susceptible to undue influence and that undue influence was exerted, this Court must next decide whether the facts found by the bankruptcy court support a determination that she submitted to the overmastering effect of the influence. This Court agrees

with appellant that the parties have not stipulated that Elizabeth Dovydenas' will was overcome. It cannot agree, however, with appellant's argument that the evidence of overmastering influence is flawed because of the bias of witnesses. Nor can it reject the bankruptcy court's findings because, as appellant argues, Stevens' statements to Elizabeth Dovydenas are "implausible." It is the role of the finder of fact to sift the plausible form the implausible. This Court has already determined that the bankruptcy court's findings of fact were not clearly erroneous, and now must apply them to the relevant legal standards.

According to the findings of the bankruptcy court, Stevens, with the help of his wife and Hill, convinced Elizabeth Dovydenas that her family and her lawyers were motivated by Satan to advise her against giving money to TBS. He convinced her that the more they protested, her gifts would have a greater likelihood of thwarting Satan. These actions alienated Elizabeth Dovydenas from her husband, family, and other sources of impartial advice. More persuasive than any of these matters, though, is Stevens' deliberate program of lying to Elizabeth Dovydenas about the effects of her donations on outside events as exemplified by the migraine and Turkia incidents. That Elizabeth Dovydenas was able to commit acts, such as lying to her father, which Stevens encouraged her to do, does not mean, as appellant asserts, that she was willful and free of influence.

Given a stipulation that Elizabeth Dovydenas was susceptible to undue influence and holding that the facts support a conclusion that undue influence was exerted, this Court concludes that the facts found by the bankruptcy judge

sufficiently prove Elizabeth Dovydenas submitted to the overmastering effect of Stevens' influence on behalf of TBS.

C. THE FIRST AMENDMENT

Appellant raises a series of objections based on the first amendment opposing Elizabeth Dovydenas' claim against TBS based on undue influence. At root, these arguments attempt to shield TBS from the consequences of Stevens' undue influence by virtue of its status as a church and Stevens' status as a clergyman. Appellant also tries to mischaracterize the case and then, based on these mischaracterizations, seeks first amendment protection. These mischaracterizations include statements that the matter is an intra-church dispute, an attempt to adjudicate the validity of a religious belief, and an attempt to stifle religious beliefs. Finally, it presents the novel argument that any words Stevens may have uttered to Dovydenas constitute "religious speech" which, appellant claims, is granted absolute protection.

The facts, as found by the bankruptcy court, show that the matter is none of these things. It is a claim by a former member of a church that she was the victim of undue influence. As such, it raises a narrow first amendment issue: were the statements found to constitute undue influence made pursuant to Stevens' religious beliefs? According to Stevens' own testimony, these statements were not reflective of Stevens' religious beliefs and thus are not protected by the first amendment.

Appellant's attempts to invoke the protection of the first amendment are, hence, based on a series of false premises. Insinuated among them is its persistent claim that it is Stevens, not Dovydenas, who is telling the truth. At one point appellant attempts to give this argument constitutional dimensions by asserting that since truth telling is a tenet of Stevens' religion, the bankruptcy court was barred from disbelieving his testimony. Appellant's claim that a minister's testimony is constitutionally protected from being disbelieved is without basis in law. In order to succeed, appellant must prove that given the facts as the bankruptcy judge found them, allowing Elizabeth Dovydenas' claim form the money she gave TBS would infringe on TBS' first amendment rights.

In determining whether or not Elizabeth Dovydenas was the victim of undue influence, this Court has relied on the findings of fact made by the bankruptcy court. Thus, to the extent that the bankruptcy court found credible Elizabeth Dovydenas' statements that Carl Stevens told her certain things, this Court must assume he did, in fact, say them unless such a finding would be clearly erroneous. Stevens' statements to Elizabeth Dovydenas are among actions attributable to him which this Court has determined constitute undue influence. As will be discussed below, his legal responsibility for making these statements will depend on the extent to which they were motivated by his sincerely held religious beliefs. Therefore, it is important to point out that the statements Stevens made, which the bankruptcy court relied on in finding undue influence, are not religious beliefs or tenets of either Stevens or TBS, according to appellant's own admissions based on the testimony before the bankruptcy court. Trial Transcripts ("T. Tr.") 6B and 12.

By identifying statements made by Stevens, which do not express religious beliefs or tenets of TBS, this Court is not engaging in its own review of TBS's theology. Rather, it is relying on the statements of Stevens and of John Leonard, the director of the Stevens Bible College, regarding their own theology. Without repeating the analysis of undue influence set out above, this Court notes that based on Stevens' and Leonard's own testimony at the hearing - - indicated by citations to the trial transcript - - the following, which the bankruptcy court found were the bases of the statements which unduly influenced Elizabeth Dovydenas, are not beliefs of TBS or of Stevens:

a) Elizabeth Dovydenas had a special calling to give money to The Bible Speaks. T. Tr. 6B at 142.

b) Giving money could bring blessings and material benefits from God. T. Tr. 12 at 204.

c) Pastor Stevens was God's man. T. Tr. 6B at 131.

d) Pastor Stevens' words were the words of God. *Id.* at 133.

e) Demons influence outsiders. *Id.* at 143.

f) Outsiders should be lied to so as to confuse the devil. *Id.* at 140 - 141.

g) There is a duty to submit to and obey Carl Stevens. *Id.* at 134.

These principles, which Stevens expounded to Elizabeth Dovydenas and which this Court has held exerted undue

influence on her, are not beliefs of TBS by appellant's own admission. 73 B.R. at 866. Therefore, actions taken or statements made espousing the above principles are not entitled to the protection of actions taken or statements made pursuant to sincerely held religious beliefs.

1. *Cantwell v. Connecticut*: Actions Taken Pursuant to Religious Beliefs

The Supreme Court in *Cantwell* held that, while religious beliefs had complete first amendment protection, conduct based on religious beliefs is subject to restriction. *Cantwell v. Connecticut*, 310 U.S. 296 (1940), is the leading Supreme Court case regarding free exercise of religion, and presents the distinction between religious beliefs and religious conduct. In *Cantwell*, Newton Cantwell, a Jehovah's Witness, was convicted of inciting a breach of the peace by playing an anti-Catholic record on a public street corner. The Supreme Court overturned the conviction finding that playing the record was an exercise of Cantwell's religious beliefs. *Id.* at 304. Therefore, the Court held, convicting him of a breach of peace would "unduly ... infringe" his protected freedom of religion. *Id.* The Supreme Court was careful to note that it was not granting blanket protection to acts or speech motivated by religious beliefs stating that "[n]othing we have said is intended even remotely to imply that, under cloak of religion, persons may, with impunity commit frauds upon the public." *Id.* at 306. *See General Council on Finance & Administration, United Methodist Church v. California Superior Court*, 439 U.S. 1369 (1978) (Rehnquist, Cir. J.).

The holding of *Cantwell* is directly relevant to the facts here because the activity permitted the Jehovah's Witness, playing a record on a street in violation of local noise control laws, would be prohibited were it not done pursuant to an individual's religious beliefs. Equally, Stevens' conduct would be prohibited as undue influence unless it was done pursuant to religious beliefs.

2. Court's Right to Inquire into Religious Beliefs

In granting protection to actions pursuant to religious beliefs, the Supreme Court gave courts the power to determine the existence of these beliefs. Appellant, as discussed below, misinterprets *Cantwell* as a cloak protecting it from judicial scrutiny because it claims its actions were "generally" religious and were conducted by a clergyman on behalf of his church. Appellant's claims are supported by a series of false propositions, including that churches and clergymen are immune from judicial scrutiny, and that a person need not hold the religious beliefs which result in conduct in order to be protected.

In *United States v. Ballard*, 322 U.S. 78 (1974), the Supreme Court held that a court cannot assess the truth or falsity of a religious belief. A court may, however, identify an individual's religious belief when that individual has invoked them. *United States v. Seeger*, 380 U.S. 163, 185 (1965) (court could determine nature, but not validity, of religious beliefs of persons seeking military exemption). In order to allow the protection afforded by *Cantwell*, however, a religious belief must be sincerely held. Unless appellant is claiming protection for speech made pursuant to Stevens' or its own sincerely held

religious beliefs, its status as a church, or Stevens' status as a clergyman, cannot immunize it from the legal effect of those words as acts of undue influence. *See Van Schaick v. The Church of Scientology of California*, 535 F. Supp. 1125, 1142 - 43 (D. Mass. 1982). Appellant cannot, therefore, avoid this Court's inquiry into whether or not Stevens' actions were pursuant to his religious beliefs.

3. Speech Versus Action

Appellant's final argument regarding the first amendment is a deliberate distortion of the law. It claims that since the bankruptcy court found Stevens influenced Elizabeth Dovydenas through statements he made to her, holding Stevens liable for undue influence would be an impermissible restriction of religious speech. This is because the speech took place in the context of a pastor "[preach]ing to members of his flock." Appellant's Brief at 13. However, since this Court has determined that the statements made by Stevens to Elizabeth Dovydenas which constituted undue influence were not pursuant to his religious beliefs, those statements cannot constitute "preaching" in the sense that they are protected as expressions of religious beliefs.

Underlying appellant's distortion of first amendment law is a more serious attempt to immunize Stevens from the consequences of his undue influence by offering a spurious distinction between speech and action. Although appellant argues that the "means [of exerting influence] was speech" and thus entitled to greater first amendment protection than that afforded to conduct under the first amendment, appellant's reliance upon a speech/conduct distinction in this case is

misplaced. It is misplaced because as constitutional scholar Laurence Tribe explains, "[a]ll communication except perhaps that of the extrasensory variety involves conduct." Tribe, *American Constitutional Law* 599 (1978). The issue, then, of whether the appellant is entitled to protection under the first amendment does not depend upon whether Stevens' statements to Elizabeth Dovydenas constituted speech or conduct, but rather whether his statements were expressions of sincerely held religious beliefs.

As applied to Stevens, then, the extent to which he is protected by the first amendment for his speech to Elizabeth Dovydenas is one of mere academic interest because this Court has already determined that his undue influence was not motivated by his religious beliefs. Therefore, whether that influence was by word or deed, it is afforded no special protection. While the first amendment protects a wide variety of speech and actions, it is not an absolute shield for wrongdoers from the legal consequences of their conduct. Since Stevens could not show that he exerted undue influence pursuant to his religious beliefs, he cannot claim first amendment protection for his conduct.

4. Not an Imposition of State Values

In holding that Stevens' actions are not protected by the first amendment, this Court is not weighing the state's rights against the debtor's. Rather, it relies on the debtor's own statement that its acts were not pursuant to its religious beliefs. Thus, this Court is not invoking the "*Reynolds*" exception to the free exercise clause. *Reynolds v. United States*, 98 U.S. 145 (1878). In *Reynolds*, the Supreme Court held that even though

polygamy was a sincerely held Mormon belief, a state's interest in the sanctity of marriage outweighed the Mormons' right to practice polygamy. *Reynolds*, 98 U.S. at 164. The Court did not, of course, infringe upon their right to belief in polygamy. This doctrine has been applied sparingly and only in cases where health and safety are endangered. *See Goldman v. Weinberger*, 475 U.S. 503, 510 (1986) (although wearing of a yarmulke is part of Jewish religious observance, necessity of maintaining military discipline requires that it could not be worn if violative of Air Force dress code). This doctrine is not applicable here. The issue is not that a state interest outweighs Stevens' right to commit actions stemming from his religious beliefs. The point, rather, is that Stevens was not acting pursuant to his religious beliefs when he made the statements which unduly influenced Elizabeth Dovydenas.

5. Clerical Immunity

Finally, neither churches nor clergymen are immune from judicial scrutiny. *See General Council on Finance & Administration, United Methodist Church v. California Sup. Ct.*, 439 U.S. 1369 (1978) (Rehnquist, Cir. J.) (Justice Rehnquist refused to grant a stay in an action against a church for breach of contract, fraud and violation of security laws); *Cantwell v. Connecticut*, 310 U.S. at 306; *Kedroff v. St. Nicholas Cathedral for the Russian Orthodox Church in North America*, 344 U.S. 94, 120 (1952); *Van Schaick v. the Church of Scientology of California, Inc.*, 535 F. Supp. at 1125. The Anglo-American legal system has long confronted the problem of undue influence exercised by a clergyman or spiritual advisor. In *Huguenin v. Busely*, 14 Ves. Jr. 273, 33 Eng. Reprint 526, 6 ERC 834 (1807), 14 A.L.R. 2d 652 (1949), the court set aside a voluntary

settlement made by a widow upon a clergyman who persuaded her to transfer the management of her affairs from her lawyers to him before making the gift. *See generally* Annot., *Undue Influence in Gift to Clergyman, Spiritual Adviser, or Church*, 14 A.L.R. 2d 649 (1949).

More recently, Justice Rehnquist, acting individually, denied a church's application for a stay pending a review on *certiorari*. *General Council on Finance & Administration, United Methodist Church v. California Superior Court*, 439 U.S. at 1369. The church was a defendant in a class action. The class was seeking damages for breach of contract, fraud and violations of state securities laws by a non-profit organization which was found to be the alter ego of the church. In rejecting the church's claim for religious immunity, Justice Rehnquist stated:

> There are constitutional limitations on the extent to which a civil court may inquire into and determine matters of ecclesiastic cognizance and policy in adjudicating intra-church disputes. But this court never has suggested that those constraints similarly apply outside the context of such intraorganization disputes. Thus, [cases regarding intrachurch disputes] are not in point. Those cases are premised on a perceived danger that in resolving intrachurch disputes the State will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs. Such considerations are not applicable to purely secular disputes between third parties and a particular defendant, albeit a religious affiliated organization, in which fraud, breach of contract, and statutory violations are alleged.

Id. at 1372 - 73 (citations omitted).

This district has applied the holding of *United Methodist Church* in denying a church's claim that its actions, which the plaintiff alleged included fraud and infliction of emotional distress, could not be reviewed because they were protected by the first amendment. In *Van Schaick*, the court wrote:

> [E]ven if we were to find that the California Church is a religious institution, the free exercise clause of the First Amendment would not immunize it from all common-law causes of action alleging tortious activity. Causes of action based upon some proscribed conduct may, thus, withstand a motion to dismiss even if the alleged wrongdoer acts upon a religious belief or is organized for a religious purpose.

Id. at 1134 (citations omitted). This Court's right to review is even stronger here where the church was not acting upon a religious belief but merely claims protection based on its status as a religious institution.

Making first amendment arguments does not, obviously, create a first amendment issue. The Supreme Court has specifically held that status as a religious institution or clergyman does not confer immunity from tortious activity. Since this Court has determined that Stevens' statements to Elizabeth Dovydenas constituted undue influence, his only possible first amendment defense could be that his statements were made pursuant to his religious beliefs. Since appellant admits that Stevens' statements were not made pursuant to his religious beliefs, they are not protected by the first amendment. Having reviewed its findings of law *de novo*, this Court upholds the

bankruptcy court's judgment and allows Elizabeth Dovydenas' claim against The Bible Speaks in the amount of $6,581,356.25.

D. MOTION FOR SUMMARY JUDGMENT

Finally, appellant appeals the bankruptcy court's denial of its motion for summary judgment issued on February 9, 1987. Since the denial of the motion was an interlocutory order, this is the appropriate time to file an appeal.

To survive a motion for summary judgment, the non-moving party must set forth evidence from which a jury might return a verdict in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 2514 (1986). Further, when considering a motion for summary judgment, this Court must view the facts and all reasonable inferences to be drawn from them in the light most favorable to the non-moving party. *Ismert & Associates, Inc. v. New England Life Insurance Company,* 801 F. 2d 536, 537 (1st Cir. 1986). Appellant claims in its motion that Elizabeth Dovydenas should not prevail because she has violated the tax code and filed a false claim against TBS' estate. Appellant in its briefs before this Court presents two different arguments for the granting of summary judgment. Since appellant's arguments in its first brief approach the inscrutable, this Court relies on the somewhat more lucid restatement for "clarity" in its reply brief. Appellant's Reply Brief at 15.

Briefly, appellant's arguments stem from Elizabeth Dovydenas' joint 1985 tax return. On the return, filed after she entered her petition in the current matter, she declared the

$585,647 which she had given to TBS that year as a charitable contribution pursuant to 26 U.S.C. § 170. The prior year Elizabeth Dovydenas also claimed the $1,001,031 she gave to TBS as a charitable contribution pursuant to 26 U.S.C. § 170. Appellant states, correctly, that in order for a charitable contribution to be deductible from income under 26 U.S.C. § 170, the charity must be eligible to receive such gifts pursuant to 26 U.S.C. § 501 (c) (3) and the donor must have no expectation of recovering her money. This Court also agrees with appellant that 18 U.S.C. § 152 makes it a crime to file a false claim in a bankruptcy proceeding.

It is at this point that appellant's argument strays into novel territory. Appellant claims that since TBS is eligible to receive deductible donations under section 501 (c) (3), Elizabeth Dovydenas' claims of those donations under section 170 constitute statements under oath that she had no expectation of recovering the money. Thus, continues the argument, Elizabeth Dovydenas should nor recover the money because: 1) by categorizing the money she gave to TBS as a deduction against her taxable income, she swore she had no right to it and thus her claim against the estate is false, and/or 2) by filing a claim against the estate for recovery of the money she gave to TBS she swore she had a right to recover it and thus her income tax return is false.

Appellant also argues that Elizabeth Dovydenas should not recover because section 501 (c) (3) of the tax code prevents the income of a charitable organization from inuring to a private individual. This argument is a dangerously incorrect interpretation of the tax code. There is no support for appellant's claim that section 501 (c) (3) protects charitable

organizations from having judgments entered against them and, therefore, this Court rejects appellant's argument.

Appellant's argument that Elizabeth Dovydenas is guilty of a felony either because of her 1985 tax return or her claim in bankruptcy would be more appropriately brought before the Internal Revenue Service or the United States Attorney rather that this Court. Viewing the facts in the light most favorable to the non-moving party, this Court notes that Elizabeth Dovydenas disclosed on her 1985 tax return the circumstances of her impending claim against TBS. Thus, she alerted law enforcement officials of her actions. There is no provision of the tax or bankruptcy code which requires this Court to disallow Elizabeth Dovydenas' claim. More importantly, the factual disputes between the parties make this case inappropriate for summary judgment. *See Kennedy v. Josephthal & Co.*, 814 F. 2d 798, 803 - 04 (1st Cir. 1987). Thus, the bankruptcy court's denial of appellant's motion for summary judgment is upheld and the motion will be denied.

V. CONCLUSION

Having found the bankruptcy court's conclusion that debtor-appellant TBS exerted undue influence which resulted in gifts of $6,581,356.26 by the claimant-appellee is not clearly erroneous, the judgment of the bankruptcy court dated May 19, 1987 is hereby AFFIRMED. Appellant's motion for summary judgment dated February 9, 1987 is DENIED.

It is So Ordered.

s/ Frank H. Feedman
Chief United States District Judge

APPENDIX C - JUDGMENT AND OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF MASSACHUSETTS [PP. 84a - 134a]

United States Bankruptcy Court
District of Massachusetts

In re	)	
	)	Chapter 11
THE BIBLE SPEAKS,	)	Case No. 86-40392-JFQ
	)	
Debtor	)	

JUDGMENT ALLOWING CLAIM OF ELIZABETH DOVYDENAS

The claim of Elizabeth Dovydenas is hereby allowed in the sum of $6,581,356.25.

At Worcester, the 19th day of May, 1987.

s/_____
James F. Queenan, Jr.
U. S. Bankruptcy Judge

APPENDIX C

[Opinion and Order - Bankr. D. Mass. 1987]

United States Bankruptcy Court
District of Massachusetts

In re	)	
	)	Chapter 11
THE BIBLE SPEAKS,	)	Case No. 86-40392-JFQ
Debtor	)	

OPINION ALLOWING CLAIM OF ELIZABETH DOVYDENAS

Elizabeth Dayton Dovydenas (the "Claimant") seeks the return of several large contributions made to The Bible Speaks (the "Church"). The Church is a debtor in this Chapter 11 proceeding primarily because of this claim, having prevailed in its opposition to the Claimant's motion to dismiss the proceeding. *See In re The Bible Speaks*, 65 B. R. 415 (Bankr. D. Mass. 1986). The Court has conducted a three week trial of the claim, after extensive discovery proceedings by both parties that produced much acrimony. By separate judgment, the Court has today allowed the claim in the sum of $6,581,356.25. This is a case of undue influence exerted upon a church donor which appears to be unsurpassed in our jurisprudence in its variations and in the sums involved. Revealed is an astonishing saga of clerical deceit, avarice, and subjugation on the part of the Church's Founder, Carl H. Stevens. He has abused the trust of the Claimant as well as the trust of many good and devout members of the Church. This is also, apparently, one of the few restitution cases brought by a church donor where First Amendment issues have been fully briefed and argued by the parties. We set forth here findings of fact and conclusions of law in support of the judgment allowing the claim.

I. PRINCIPAL SUBSIDIARY FINDINGS OF FACT

A. THE PARTIES

The Church is an evangelical, Bible-believing fundamentalist Christian church. It enjoys corporate tax exempt status as a religious and educational organization. It has about 1,200 parishioners and supports missionary work in numerous foreign countries. The Church operates The Stevens School of the Bible, which enrolls some 600 adults, many of whom board at the school, and a private day school for children in kindergarten through the twelfth grade, which enrolls about 300 students. It conducts a daily radio program in the form of an hour-long "talk show" concerning religious education, which is broadcast throughout the country. The Church has a cooperative relationship with a number of autonomous religious organizations located in this and other countries, called "affiliated ministries," which also use the name "The Bible Speaks." The Church owns extensive real estate in Lenox, Massachusetts, which was formerly occupied by a college preparatory school for boys. The church moved its principal operations to Lenox from South Berwick, Maine in 1976.

Carl H. Stevens ("Stevens"), age 57, founded the Church in 1973. He is its Pastor and President, and at all material times has been its chief executive and chief operating officer. Stevens is articulate and mild in manner, by he can at times fulminate from the pulpit in the style of a Cotton Mather. He has a commanding presence in private. Although Stevens has basically no formal education, he has taken courses at Moody Bible Institute. He holds an honorary degree from Clarksville Theological Seminary, for which the Church paid a "processing" fee.

APPENDIX C

[Opinion and Order - Bankr. D. Mass. 1987]

The Claimant, age 34, is an intelligent college graduate who has taken post-graduate courses in art. She is an attentive mother, and a trusting and dependent person. She is in excellent health and enjoys many of the simple aspects of life, such as camping, horses and dogs. She has continued her interest in art. The Claimant is a descendent of the founders of the Dayton Department Stores, now operated by Dayton-Hudson Corporation ("Dayton-Hudson"). She grew up in a suburb of Minneapolis, and came into substantial wealth at an early age. Prior to her involvement with the Church, her net worth was approximately $19 million. In 1978, she married Jonas Dovydenas ("Jonas"), who was then working as a free lance photographer in Chicago. He is some 14 years older than the Claimant, and is a very capable individual.

The Claimant and Jonas began their married life in Chicago. After the birth of their first child, they desired a country setting to raise their family. In 1981, they moved to Lenox, Massachusetts, a cultural town in the picturesque Berkshire Mountains. Neither Jonas nor the Claimant had any previous close association with that area. They were very much in love and happy in all aspects of their married life. They were particularly relaxed concerning their respective roles in family finances. The income from the Claimant's investments was of course more than enough to support them. They had agreed early in their marriage that it made no sense for Jonas to attempt to earn enough for their joint support. In Lenox, Jonas continued his activities as a free lance photographer, although these became less extensive because of his involvement in various projects improving their substantial property there.

B. BEGINNING OF CLAIMANT'S RELATIONSHIP WITH THE CHURCH AND STEVENS

The Claimant was raised in a Presbyterian family, and Jonas in a Catholic family, but neither attended these churches regularly as adults. After moving to Lenox, they attended a few different churches before settling on the Church in 1982. The Claimant was attracted to the Church by the large and enthusiastic crowds at its services, as well as by the relative youth of its parishioners. After attending several services, they left a $600 check in the basket. This generosity precipitated a travail for their marriage.

Shortly thereafter, two ministers of the Church appeared, uninvited, at the Claimant's home. They asked whether Stevens could visit the Claimant, and she consented. Stevens's secretary called, and the Claimant invited him to tea. Stevens was then a widower; he came accompanied by Barbara Baum ("Baum"), whom he was dating and whom he married in 1984. During that first visit he asked the Claimant and Jonas, separately, if they had accepted Jesus Christ. Each replied in the negative. The Claimant was embarrassed by the question. Baum, who is the Claimant's age, expressed her desire during that visit to get to know the Claimant better.

Baum and the Claimant soon became good friends, and the Claimant began spending more time in the activities of the Church. Sometime later Baum introduced the Claimant to Kathleen M. Hill ("Hill"), who was also about the Claimant's age. Hill was employed as a bookkeeper by the Church and lived on the Church's property. She was close to both Stevens and Baum. Hill also became very friendly with the Claimant, and spent an increasing amount of time with her in church and social activities.

In mid-1983, the Claimant had a conversation with Baum and Stevens in Stevens's office, in which for the first time the Claimant affirmed to Stevens that she was a "born again Christian." Stevens then asked her to pray for Jonas, who had not made this affirmation. He told the Claimant that Jonas was in the Kingdom of Darkness because he was not yet "born again" through the Church. This statement caused the Claimant grave concern, and she began to view Jonas as one controlled by the Devil. Her changing view of Jonas was the beginning of a growing estrangement between them. The Claimant thereafter increased the amount of time she spent with Stevens and in the activities of the Church. She had numerous private counseling sessions with Stevens, attended daily Bible classes and daily "rap sessions" that he conducted, and occasionally traveled to Framingham with him, where he delivered a sermon on Friday nights.

The Claimant's confidential relationship with Stevens, her psychological make-up, and his role in her marital strife will be more fully described later. It suffices to state here that she disclosed to Stevens the details of her wealth, as well as essentially all other personal matters. Stevens told her, in substance, on numerous occasions that: giving money to the Church was her primary mission on earth; all she needed to live on was $1 million, and the rest should be given to the Church; she should not be influenced by her husband, or her parents, sisters or advisors, because they have not been "born again" through the Church and are therefore controlled by the Devil; and her money gave her the power to release God's judgment in order to effect miracles. The Claimant accepted and believed all of this.

C. THE $1 MILLION GIFT

Baum suffered from severe migraine headaches, which frequently incapacitated her. In November of 1984, shortly before Stevens and Baum were married, the Claimant told them, separately, she had received a message from God that she should give $1 million to the Church in order to cure Baum's migraine condition. Stevens and Baum were delighted, and urged her to do this. The Claimant got this notion because Stevens had convinced her that she was a special person who could release material benefits from God though gifts to the Church. The idea first came to her in October of 1984 when Stevens said to her, while they were in a car together driving from an evening church service of an affiliate in another city, that it "seems" she had been hearing from the Holy Spirit. The Claimant's normal annual gifts to charities had been about $10,000 per year, except in 1977 when she gave $127,000 to the Minneapolis Art Center. When the Claimant informed Jonas of her intention to make the $1 million gift, he said he thought the idea of giving that amount away in one fell swoop was "crazy." He urged her to consult with the legal and financial advisors whom they and other members of the Dayton family had employed for years. She refused. Jonas then contacted Okabena Company ("Okabena"), the family's financial advisor located in Minneapolis, and asked for its advice concerning the gift.

On November 20, 1984, Okabena sent a three page memorandum to the Claimant and Jonas discussing the relative economic and tax benefits from three alternative methods of making the $1 million gift: an outright gift in 1984; a gift in installments over six years; or the creation of a charitable income trust. Okabena pointed out in the memorandum that an outright gift in 1984 was disadvantageous from a tax point of view because the Claimant would be unable to deduct the full

amount from her taxable income, due to annual limitations on charitable deductions.

The Claimant did not wait for this advice before making her decision. On November 20, 1984, she sent a letter to Okabena directing it to transfer $1 million of Dayton-Hudson stock to the Church in December. When she later received the Okabena Memorandum of November 20th, she did not discuss it at any length with Jonas. She did, however, show it to Stevens and asked him for his thoughts. He told her to disregard the Okabena advice because it was the work of the Devil, and to proceed with the gift. On December 14, 1984, Okabena brought about the transfer from the Claimant to the Church of 31,200 Dayton-Hudson shares at a value of $1,001,031.25. The Claimant did this over the objection of Jonas who thought she should follow Okabena's advice.

D. THE $5 MILLION GIFT

Thereafter, Stevens and Baum (who by then was Mrs. Stevens) told the Claimant that Baum's migraine condition had been cured by reason of this gift. To the contrary, Baum continued to suffer from the condition and it required her to be hospitalized in January of 1985. Stevens and Baum nevertheless deceived the Claimant into thinking that the condition had been cured, and she believed this at all material times. Their purpose was to further promote the claimant's notion that she was a special person anointed by God to promote good though gifts of her money to the Church.

In early April of 1985, the Claimant informed Stevens that God had told her to make a $5 million gift to the Church in the following June. Stevens again expressed delight, and told her not to inform anyone of her intention, especially Jonas. She

agreed to comply with this direction. For some time Stevens had harbored the ambition to become a television evangelist. He and the Claimant had discussed the possibility of the Church becoming a television ministry. The Church had long-range building plans which included conversion of a skating rink into a large new chapel, and the construction of television production facilities, as well as a swimming pool. Upon receiving news of the forthcoming $5 million gift, Stevens immediately began finalizing these plans. He also began planning to have the Church purchase a condominium for his personal use in Palm Beach, Florida.

On April 18, 1985, the Claimant and Jonas left with their two children for Sanibel Island, Florida to join the Claimant's parents and sisters in celebrating her mother's birthday. On that morning, before they left, Baum called the Claimant to inform her that Benjamin Turkia ("Turkia"), one of the Church's ministers, was imprisoned in Romania, and to ask the Claimant to pray for him. She said the Claimant: "They are probably pulling out his fingernails right now." In fact, Turkia had been detained by Romanian border guards for only 24 hours, and had been released on April 17th. He arrived in Budapest, Hungary on April 17th at 8:00 P.M. Budapest time, at which point his companion placed a call to a friend in Pennsylvania informing him of what had happened and requesting him to call Turkia's wife. Turkia's wife was immediately informed of the detention and release. She was then living in Lenox in the home of Edward Canino ("Canino"), an employee of the Church. On April 18th, after her phone conversation with Baum, the Claimant telephoned Okabena to inform it of her intention to give $5 million to the Church.

On April 21st, Jonas left Florida to return to Lenox and the Claimant remained there with her two children for a few days. On the evening of April 21st, the Claimant called

Stevens in Lenox to inform him that she had decided to make the $5 million gift immediately rather than in June. She said she wanted to do this in order to obtain Turkia's release. Stevens replied "Good-get a jump on the Devil." Stevens encouraged her in her belief that the gift had the power to effect Turkia's release. On April 22, 1985, the Claimant wrote to Okabena from Florida and directed Okabena to transfer $5 million of Dayton-Hudson stock to the Church. Shortly after the Claimant returned from Florida, she learned that Turkia was free and had joined his wife in Lenox. She concluded that his release was brought about by her declared intention to make a gift for that purpose, and resolved to go ahead with the gift immediately. Stevens, Baum and Hill encouraged her in this thinking, and they again urged her not to tell Jonas, Turkia, or anyone else about the gift, with the exception of Okabena whose services in the transfer were necessary.

In the evening of April 27th, Stevens met with the Claimant and told her, in Hill's presence, that she should write a letter to him expressing her intentions concerning the $5 million gift; he told her a number of things to say in the letter. On April 28th, Hill dictated the letter to the Claimant from notes Hill had taken during the prior conversation with Stevens. The Claimant wrote down all that she was told, and gave the letter to Hill. This April 28th letter contains statements that no one from the Church had asked her to make the gift or knew of her intention to make the gift, and that she had never been "pressured into giving money in any way either publicly or privately." These statements were false and served only Stevens's interests. At about the same time, Stevens suggested to the Claimant that she get a new post office box and direct Okabena to send all mail there, so that Jonas would not discover what was going on. The Claimant immediately did this. She also directed Okabena not to call her at home.

Bruce Dayton, the Claimant's uncle, was the head of Okabena. In late April, he informed Wallace Dayton, who is his brother and the Claimant's father, of the planned $5 million gift. He did this at least in part because of his concern that s subsequent sale of the stock by the Church could have an adverse effect upon its value. Wallace Dayton was not told of the previous $1 million gift, and he was not then aware of that prior gift. News of the intended $5 million gift disturbed him. He telephoned the Claimant on April 30th, and started to express his concern and his desire to come to Massachusetts to discuss the matter. She put him off and asked him to call her back later that evening. The Claimant then called Stevens and told him of her father's call. Stevens told her to lie to her father, to tell him that the gift was to be in an amount that was nowhere near $5 million. Stevens told the Claimant that Jonas must not overhear this conversation, so that it was important that Jonas be out of the house when Wallace Dayton called back. He arranged for Canino to invite Jonas out for dinner that evening, and Jonas accepted the invitation. When Wallace Dayton called back, the Claimant did as she was told, deceiving her father of her intentions. In his words, "she disarmed me." In that conversation, and in another the next day, the Claimant declined to see her father. He let the matter drop at that point; he learned of neither the $1 million gift nor the $5 million gift until the following November.

Okabena, in the meantime, had forwarded the Claimant a stock power which the Claimant signed on May 1st and returned to Okabena. On May 9th, Okabena sent to a transfer agent the executed stock power with stock certificates representing 125,400 shares of Dayton-Hudson stock having a value of $5,000,325.00, and requested the agent to transfer the stock to the Church, which was done. Jonas left in early May on a photography trip to Pakistan. Before he left, he suspected that the Claimant was going to make another sizable gift to the

Church, but he didn't learn of the $5 million gift until the following December.

The Church sold the stock received in this gift. These funds enabled it to convert its skating rink to a beautiful chapel, to pay off a large mortgage, to construct a swimming pool and to make a number of expenditures in furtherance of its religious and educational goals. The chapel was equipped with a closed circuit television system which permitted services to be viewed from elsewhere within the Lenox complex. The funds also enabled the Church to purchase and furnish a condominium in Palm Beach at a cost of $320,875. This purchase was made for the personal use of Stevens and Baum. No one else has ever used the property, nor has there been any attempt to rent it. The Claimant was never informed of the intention to make this purchase or of the fact that it was made.

During the period from about April 27th to May 9th, Stevens and Hill caused the Claimant to make about six telephone calls to Okabena in order to expedite the transfer. Canino also spoke to Okabena for the same purpose. Stevens and Hill told the Claimant what to say to Okabena, and they advised her to be "aggressive." On several occasions Hill, at Stevens's direction, was on an extension line listening to the conversation. The personnel at Okabena to whom the Claimant spoke during these conversations merely accepted her directions, and did not take any position against the gift. The Claimant had no conversation concerning the matter with her uncle, Bruce Dayton.

E. TERMINATION OF RELATIONSHIP WITH OKABENA

The Claimant was angry that Okabena, through her uncle, had divulged her plans to her father. She regarded this as a breach of Okabena's obligation of confidentiality. She was encouraged in this attitude by Stevens, Baum and Hill. Stevens indicated to her that this action by Okabena was an example of the Devil seeking to frustrate God's work. She accepted this characterization of Okabena. Stevens told the Claimant that she should change financial advisors. He recommended James Freed of Dean Witter Reynolds Inc. ("Dean Witter"), whom the Church had recently employed to give it advice in the investment of its new wealth. The Claimant readily agreed to meet with Freed. Stevens informed Freed of this, giving Freed information concerning the Claimant's wealth, including her substantial holdings in Dayton-Hudson. He told Freed of the possibility of further gifts from the Claimant to the Church.

Stevens arranged a meeting in his office between the Claimant and Freed on July 9th. At that meeting, Freed, rather than first asking the Claimant what her investment goals were, began talking about the income disadvantages of Dayton-Hudson stock compared to tax free bonds. The Claimant at no time had as her investment goal the obtaining of maximum income as opposed to capital appreciation. On July 12, 1985, in a letter to Stevens with no copy to the Claimant, Freed outlined his thoughts concerning the Claimant's investments, again recommending replacement of Dayton-Hudson stock with tax free bonds. At the end of that letter he stated that the Claimant "may want to set up a trust account in which The Bible Speaks holds the investment and mails her the interest." On July 20, 1985, the Claimant opened on account with Dean Witter. She directed Okabena to cease all investment activity on her behalf and to transfer all of her assets to the control of

Dean Witter. In the succeeding months, agency control over the bulk of the Claimant's assets was transferred from Okabena to Dean Witter. At the direction of Stevens, the Claimant concealed all of this from Jonas. For example, Hill and the Claimant picked September 14th to meet with Freed at his office in New Jersey because Jonas was attending a wedding on that Saturday. In October of 1985, Freed caused the sale of over $5 million of Dayton-Hudson stock. He advised the Claimant that this sale would not bring about any tax liability because of her charitable gifts. In fact, the Claimant has been assessed a substantial tax as a result of the transaction.

F. THE 1985 WILL

In June of 1985, Stevens convinced the Claimant that she should get a new lawyer to draw a will and assist her in terminating the Okabena agency arrangement. The Claimant's attorney at that time was the one who had drawn her existing will and codicils. He was a partner in the Chicago law firm of McDermott, Will & Emory, and was experienced in estate planning. That firm also represented several of the members of the Dayton family. On July 1, 1985, Stevens brought the Claimant to meet Andrew Campoli ("Campoli"), a Pittsfield general practitioner who had very limited experience in drafting even simple wills. He was on an annual retainer from the Church. With the assistance of a few other lawyers, he was then doing all or substantially all of the Church's legal work, including both corporate matters and trials. Campoli also represented Stevens personally and a number of the Church's parishioners. He did not himself attend services at the Church.

During the next six months, the Claimant and Hill made about a dozen visits to Campoli's office to discuss the will and the termination of the agency arrangement with Okabena.

Hill always accompanied the Claimant, pursuant to the directions of Stevens. Stevens had designated her as the Claimant's "covering," meaning that she was to keep him informed of the Claimant's activities. She kept Stevens fully apprised of what transpired at these sessions. Her constant presence was never explained to Campoli, and he never objected to it. Campoli was aware at an early date that the Claimant intended to make the Church the principal beneficiary of her estate. The Claimant knew that he represented the Church on a continuing basis, but at no time did Campoli make disclosure to the Claimant of the possible effect that his representation of the Church could have upon the exercise of his independent judgment on her behalf.

The Claimant furnished Campoli with a copy of her March 31, 1981 will and two codicils thereto, one executed March 31, 1981 and another executed on December 19, 1983. These instruments contained a $2 million bequest to an existing intervivos trust for the benefit of the Claimant's children, and a few other bequests. One-half of the residue of the Claimant's estate was left to Jonas outright. The remainder went to a general charitable trust whose trustee (a sister of the Claimant) had discretion to select the charitable beneficiaries. Campoli was informed that there were intervivos trusts in existence for her children, but he did not inquire as to the value of their corpus.

Hill took an active role in all conversations concerning the will. Four of these sessions were taped at Stevens's suggestion. Hill and the Claimant told Campoli that the Claimant wanted to leave Jonas only what the law required. They informed Campoli that the Claimant's marriage was strained, but that she had no present intention of obtaining a divorce. He was also aware that the Claimant's involvement with the Church was at least a part of her marital problem.

The Claimant and Hill told Campoli that the Claimant wanted to leave her children only her jewelry. This was the Claimant's desire because Stevens had convinced her of the unimportance of children having property in view of the impending second coming of Jesus Christ. She had previously made substantial annual gifts to her childrens' trusts, but had ceased this practice at Stevens's suggestion.

On December 13, 1985, the Claimant executed a new will drawn by Campoli, leaving Jonas $25,000 outright plus the right to receive income from the balance of one-third of her estate, which was to be held in trust for his benefit during his lifetime. This was the minimum amount she could leave him under Massachusetts law. The will gave only jewelry to the Claimant's children, with the explanation that "they have otherwise been generously provided for during my lifetime." The Church was left the entire residue of the estate, including the trust remainder at Jonas's death. Stevens, at Campoli's suggestion, was named the sole trustee of Jonas's trust. Hill was named executor. The will contained a direction that Stevens manage the "financial affairs" of the estate. In the event that Stevens predeceased the Claimant, this function was to be performed by seven individuals associated with the Church, including three of Stevens's children, his son-in-law, and Hill. Hill and her husband were named as alternate guardians of the Claimant's children, in the event of the prior death of Jonas. The executor was directed to have Campoli handle the estate's legal affairs. At no time did Campoli raise any issue concerning the wisdom of this entire dispositive scheme, other than to voice a mild objection to the unwieldy plan to have seven people involved in the management of the "financial affairs" of the estate if Stevens didn't survive. The dispositive scheme was dictated to him by the Claimant and Hill.

G. DAYTON FAMILY'S DISCOVERY OF THE $5 MILLION GIFT

During November 4 - 6, 1985, the Berkshire Eagle, the local newspaper, published three articles which were highly critical of the Church, based on a six month investigation by the newspaper. These articles have been taken in evidence only for the fact of their publication, and not for the truth of the statements made. Because the articles had consequences in this case, we briefly summarize their content. The Eagle cited instances of financial exploitation and manipulation of Church members. It referred to the Church's "cultist characteristics," although conceding that its members were earnest and dedicated Christians. The articles were particularly critical of alleged extreme exaltation of Stevens in the Church, and they contained criticisms of him and the Church by a number of dissident former members, including one of Stevens's sons. The articles made no mention of the Claimant.

Jonas at this time was out of the country on another sustained photography trip. His father sent copies of the Eagle articles to Wallace Dayton, the Claimant's father, who circulated them among family members. The family was greatly disturbed, and in their discussions they learned from Okabena of the $5 million and $1 million gifts. They pleaded with the Claimant by telephone to re-examine her relationship with the Church, to no avail. Jonas returned in early December. He was informed of the $5 million gift, but he was also unsuccessful in bringing about a change in the Claimant's attitude toward the Church.

H. THE $500,000 GIFT

Unknown to Jonas or the others, the Claimant at this time had decided to make another large gift to the Church. On December 3, 1985 she wrote a $500,000 check payable to the

Church on a Dean Witter check which bore her name. She then wrote a note to Stevens telling him that she had been "led by God" to make this gift to enable the Church to have television equipment "like PTL," and inquired whether this would make television specials possible. Hill persuaded the Claimant not to deliver the note and check, and to instead make the gift anonymously. Stevens's latest ploy was to pretend that the Church would take no more gifts from the Claimant without the consent of Jonas. It was thus necessary to make the gift appear to be anonymous, and to try to insulate Stevens from it.

The Claimant therefore voided the $500,000 personal check, and delivered to Hill a Dean Witter Cashier's check payable to the Church in the sum of $500,000 and Dated December 12, 1985. Hill delivered this check to the Church with an anonymous, typed note directing that the funds be used for the production of television specials. This check was promptly cashed. The Church has offered testimony seeking to persuade the Court that Stevens then knew only that a substantial gift had been made anonymously. Stevens was not only cognizant of the gift from the beginning, he devised the entire charade in an attempt to hide the gift and his involvement in it. This was part of the damage control activities which he felt were necessary by reason of the Berkshire Eagle articles. The taping of the Campoli sessions was another "damage control" activity.

I. OTHER GIFTS

The Claimant made additional gifts to the Church by check in the latter part of 1985. Their dates and amounts are as follows: $14,000 in July 1985; $50,000 in September 1985;

$10,000 in October 1985; and $4,000 and $2,000 in November 1985. She also gave Stevens $10,000 in cash in November 1985.

J. EXIT COUNSELING AND SUBSEQUENT EVENTS

The Dayton family decided in December that something should be done to try to have the Claimant make an objective analysis of her involvement with the Church. They were gravely concerned about what appeared to be an entire change of personality on her part. They were advised by a doctor to obtain professional exit counseling for the Claimant, and to consider a conservatorship as another step. They and Jonas accepted this advice. They retained two exit counselors, and they decided not to be forthright with the Claimant as to their plans.

The family invited the Claimant to come to Minnesota on the pretext that there was to be a celebration of her father's birthday; the Claimant went there with Jonas in January believing this ruse. The family had rented a house where the party was supposedly to take place. It was not until the Claimant arrived at that house that she was informed of the true purpose of the gathering. She stayed in the house for about a week with Jonas, her parents, her three sisters, brothers-in-law, and the two exit counselors. She was never physically prevented from leaving. She had numerous, often emotional discussions with her family and Jonas, and spent a few hours each day with the exit counselors. The exit counselors spoke with her about psychological aspects of organizational membership. They also showed her video tapes concerning various cults, including the group involved in the Jonestown tragedy.

The Claimant was initially shocked and annoyed. She told her family that her religious views were very important to her, and they assured her that they were not concerned about her religious views. They told her they had grave concerns about what they regarded as a virtual transformation of personality on her part. After several days, the Claimant gradually came to her senses about Stevens. The turning point came when she was able to take an objective view of a conversation she and Jonas had with Stevens at the end of December. Jonas had confronted Stevens and asked him whether he had accepted any substantial gifts after the $1 million gift, not disclosing to Stevens that he then knew of the $5 million gift. Stevens put his hand on a Bible and swore that the Church had not received any additional gifts. The Claimant at the time knew he was lying, and yet she believed him. When she realized the enormity of that deviant thinking, she knew that she needed help. Toward the end of the week the Claimant signed a new will leaving her estate to Jonas and her children, and naming her father and Jonas as executors.

After about a week at the rented house in Minneapolis, the Claimant and Jonas spent a few more weeks in Iowa where she received additional exit counseling, and they then returned to Lenox. The Claimant consented to the institution of a temporary conservatorship proceeding in a Massachusetts court. Her father and a bank were appointed temporary conservators. That conservatorship expired in April of 1986. On April 14th, the Church filed a complaint in a state court seeking damages and a declaratory judgment that the gifts were not the result of fraud or undue influence. This suit was dismissed by memorandum decision entered on June 13, 1986. The Claimant then brought suit in the same state court seeking damages and rescission based upon lack of donative intent, undue influence and fraud. The Church responded by instituting the current Chapter 11 proceeding in this Court, and it

prevailed in its opposition to the Claimant's motion to dismiss this proceeding.

The foregoing sets forth many of the Court's subsidiary findings of fact. Many of the findings are based upon the testimony of the Claimant and Jonas, who were forthright and credible. Stevens, Baum and Hill gave quite a different version of the facts. Their testimony, however, was evasive and lacking in credibility. It also conflicted with much undisputed documentary evidence. Additional subsidiary findings, as well as general findings, appear in succeeding portions of this opinion. We now turn to the governing legal principles.

II. UNDUE INFLUENCE

A. General Principles of Law

Case law in Massachusetts on undue influence is extensive. Findings of undue influence have invalidated bequests in wills, *e.g., Erb v. Lee*, 13 Mass. App. Ct. 120, 430 N.E.2d 869 (1982); *Hoffman v. Hoffman*, 192 Mass. 416, 78 N.E. 492 (1906), codicils to wills, *Reilly v. McAuliffe*, 331 Mass. 144, 117 N.E. 811 (1954), and intervivos gifts. *McDonald v. McNeil*, 300 Mass. 350, 15 N.E.2d 460 (1938). Massachusetts courts have indicated that contracts and trusts may be voided because of undue influence. *See Bruno v. Bruno*, 384 Mass. 31, 422 N.E.2d 1369 (1981) (adopting test in *Restatement (Second) of Contracts* §177(1) (1981) for undue influence in contracts); *Marshall v. Sidney B. Pfeifer Foundation, Inc.*, 9 Mass. App. Ct. 412, 402 N.E.2d 76 (1980) (revoking trust based on undue influence).

In order to prevail on grounds of undue influence in Massachusetts, the party seeking to void the gift must

demonstrate that: (1) the donor was "susceptible" to undue influence to the advantage of the donee; (2) the donee deceived the donor or exerted an improper influence over the donor; and (3) the donor submitted to the "overmastering effect" of the donee's undue infuence. *Miles v. Caples*, 362 Mass. 107, 112, 284 N.E.2d 231, 235 (1972); *Neill v. Brackett*, 234 Mass. 367, 370, 126 N.E. 93, 94 (1920). *Cf. Heinrich v. Silvernail*, 23 Mass. App. Ct. 218, 223, 500 N.E.2d 835, 840 (1986). Before these ultimate findings can be made, there must be a "solid foundation of established facts upon which to rest an inference of [the existence of undue influence]." *Neill v. Brackett*, 234 Mass. 367, 370, 126 N.E. 93, 94 (1920).

The Massachusetts courts recognize that much of this evidence will be circumstantial because direct evidence of undue influence is often unavailable. *See Miles v. Caples*, 362 Mass. 107, 112, 284 N.E.2d 231, 235 (1972); *Eddy v. Eddy*, 281 Mass. 156, 158, 183 N.E. 268, 268 - 69 (1932); *Woodbury v. Woodbury*, 141 Mass. 329, 333, 5 N.E. 275, 280 (1886). The Supreme Judicial Court of Massachusetts has stated that undue influence works in "veiled and secret ways...[T]he power of a strong will over an irresolute character or one weakened by disease, overindulgence or age may be manifest although not shown by gross or palpable instrumentalities." *Neill v. Brackett, supra*, at 369, 126 N.E. at 94. The nature of undue influence is such that it may be "exercised in indirect and underhanded ways difficult to be come at [through direct evidence]." *Hoffman v. Hoffman*, 192 Mass. 416, 419, 78 N.E. 492, 493 (1906). In making a determination of undue influence in a particular case, the court must normally consider all the circumstances surrounding a disposition, including the relationship between the parties, the physical and mental condition of the donor, the reasonableness and nature of the disposition, and the personalities of the parties. *See Neill v. Brackett, supra*, at 369 - 70, 126 N.E. at 94. Specific undue influence cases tend to be lonely islands of facts

in an ocean of law; what constitutes undue influence in one case will not necessarily constitute undue influence in a similar case. *See Hoffman v. Hoffman, supra*, at 419, 78 N.E. at 493.

The crux of the problem is of course the difficulty in determining in a particular case what degree of influence is "undue." The term "undue" necessarily implies that there are some types of influence which are "due," and courts have recognized that in all close relationships people exert an influence on each other which is natural and proper. *See Heinrich v. Silverman*, 23 Mass. App. Ct. 218, 226, 500 N.E.2d 835, 841 (1986) (Power of influence normally held by one friend over another will not automatically defeat bequest; such influence is "a simple and expected consequence of human friendship and ... compassion."); *Neill v. Brackett, supra*, at 370, 78 N.E. at 94 (Persuasive and effective influences -- such as a wife directing her husband's attention to "proper obligations" which he should provide for in his will -- are not undue so long as they are not coercive).

The general test for "undue" influence in Massachusetts is whether, based upon all the circumstances in a particular case, a donee has exercised "unfair persuasion" against: (1) a donor whom the beneficiary dominates; or (2) a donor who, by virtue of the relationship between the donor and donee, is justified in assuming that the donee will not act in a manner inconsistent with the donor's welfare. *Bruno v. Bruno*, 384 Mass. 31, 34, 422 N.E.2d 1369, 1371 - 72 (1981); *see Tarricone v. Cummings*, 340 Mass. 758, 762 - 63, 166 N.E.2d 737, 740 - 41 (1960); *Neill v. Brackett, supra; Eddy v. Eddy,* 281 Mass. 156, 160 - 62, 183 N.E. 268, 270 (1932); *see also Restatement (Second) of Contracts* § 171(1) (1981) (adopted in *Bruno v. Bruno*, as "substantially similar" to general law of Massachusetts on undue influence). The point at which influence becomes undue or

persuasion becomes unfair is controlled by the circumstances and the characteristics of the parties in the particular case.

> Any species of coercion, whether physical, mental, or moral, which subverts the sound judgment and genuine desire of the individual, is enough to constitute undue influence. Its extent or degree is inconsequential so long as it is sufficient to substitute the dominating purpose of another for the free expression of the wishes of the [donor].

Neill v. Brackett, supra, at 369, 126 N.E. at 94.

The Claimant argues that the existence of a confidential relationship between donor and donee, coupled with the failure of the donee to encourage the donor to obtain independent advice, requires the fact finder to presume that the disposition was the product of undue influence. She relies primarily upon *Markell v. Sidney B. Pfeifer Foundation, Inc.*, 9 Mass. App. Ct. 412, 402 N.E.2d 76 (1980). The Church contends that a confidential relationship raises no such presumption under current Massachusetts law. The Church relies on a more recent Massachusetts Appeals Court decision, *Heinrich v. Silvernail*, 23 Mass. App. Ct. 218, 500 N.E.2d 835 (1986), and Massachusetts Supreme Judicial Court decisions holding that a confidential relationship only gives the court cause for "closer" or "jealous" scrutiny of the transaction. *O'Brien v. Wellesley College*, 346 Mass. 192, 190 N.E.2d 879 (1963); *Eddy v. Eddy*, 281 Mass. 156, 183 N.E. 268 (1932). The Church points also to the well-established proposition that the burden of proving undue influence is normally on the party challenging the disposition. *Miles v. Caples*, 362 Mass. 107, 112, 284 N.E.2d 231, 235 (1972); *New England Merchants National*

Bank of Boston v. Mahoney, 356 Mass. 654, 657, 255 N.E.2d 592, 594 (1970); *Tarricone v. Commings*, 340 Mass. 758, 762, 166 N.E.2d 737, 740 (1960).

This question concerning the creation of a presumption has not been resolved by the Supreme Judicial Court of Massachusetts. The Claimant is correct in that *Markell* establishes that a donee in a confidential relationship with the donor has a fiduciary duty to disclose all relevant facts to the donor known to him, and the encourage the donor to seek meaningful independent advice about the transaction. *Markell*, 9 Mass. App. Ct. at 443 - 45, 402 N.E.2d at 95 - 96. *Heinrich v. Silvernail* may be reconcilable with *Markell* because *Heinrich* involved a bequest in a will rather than the creation of irrevocable trusts in favor of the donee. Under Massachusetts law, the requirement for proof of undue influence is greater when a will is involved. *Neil v. Brackett, supra*, at 370, 126 N.E. at 94; *see Wellman v. Carter*, 286 Mass. 237, 190 N.E. 493 (1934) (Bequest in will to attorney who drafted the will is not subject to presumption of undue influence normally applied when donee is attorney of donor).

Although the Supreme Judicial Court of Massachusetts, if this case were before it, might well approve the reasoning in *Makell* and adopt a presumption of undue influence in a gift to a donee in a confidential relationship with the donor, this Court need not decide this question.[1] There is ample evidence of undue influence here, with or without artificial presumptions. The Court and the parties have tried this case without reference

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[1] A large number of states do adopt such a presumption when a parishioner gives a nontestementary gift to a clergyman or spiritual advisor, and a confidential relationship exists between the two. *See generally* 38 Am. Jur. 2d, *Gifts*, §§93, 94 (1968 & Supp. 1986); Annotation, *Undue Influence in Nontestementary Gift to Clergyman, Spiritual Advisor, or Church*, 14 A.L.R.2d 649.

to presumptions, and we decide it without relying on any presumption.

B. CLAIMANT'S SUSCEPTIBILITY TO INFLUENCE

After a week or so of trial, the Court met with counsel for the purpose of exploring ways in which the length of the trial might be limited. Dr. Gersh, a psychiatrist who had examined the Claimant in Iowa, had by that time testified for the Claimant. Counsel for the Claimant had planned to introduce additional medical testimony on the issue of the Claimant's susceptibility to influence; this testimony apparently would have included some proffered expert opinion on methods used by "cults." Counsel for the Church planned to introduce evidence attacking the techniques used by the Claimant's anticipated experts, whose names had been furnished to counsel pursuant to a pretrial order. The Court suggested the possibility of each side foregoing such evidence. The parties arrived at a stipulation, which was read into the record, whereby they agreed to refrain from all such evidence and they stipulated that the Claimant was a person who could be influenced, within the meaning of such decisions as *Neill v. Brackett, supra,* and *Miles v. Caples, supra.*

The Court also finds, based upon the testimony of Dr. Gersh and other evidence, that the Claimant is more susceptible to influence that the average person. The Claimant practiced transcendental meditation for a number of years prior to joining the Church. This frequently caused her to hallucinate. She depended upon her daily meditation periods, and when she did not have them she tended to be irritable. She underwent psychotherapy for about three years in Minneapolis during and after college. This involved basic Freudian psychotherapy administered three to five times per week. She "totally"

depended upon her psychotherapist during this period. She left him only after becoming involved in transcendental meditation, at his suggestion - based upon his own experience in its techniques.

In summary, the Claimant is a suggestible, dependent and trusting person. These qualities coexist with her high intelligence and enthusiasm in her many and varied interests.

C. CLAIMANT'S CONFIDENTIAL RELATIONSHIP WITH STEVENS

By the Fall of 1983, the Claimant was totally immersed in the Church. Commencing then, and continuing through to the end of 1985, she saw Stevens constantly. She attended his daily Bible classes and "rap" sessions each morning. She would often drive between classes with him, and she frequently joined him for lunch. She listened to tapes of his sermons, and had frequent private counseling sessions with him. These were often unscheduled sessions which do not appear on his diary; she had the right to see him without an appointment.

The Claimant sought and accepted advice from Stevens on every aspect of her life: spiritual, marital, family, social, personal, and financial. She disclosed all manners of confidence to him concerning such matters, including the details of her wealth. Stevens advised her on the raising of her children. He told her how to view everyone she came into contact with, with whom to make friends and whom to avoid.

The Claimant trusted, loved and revered Stevens as a pastor and as a mentor. Although their relationship remained platonic throughout, she was totally devoted to him. The thought that he would want anything that was not in her best interests never entered her mind. She believed that he loved

and respected her in return. Stevens was well aware of the Claimant's total devotion to him and dependence upon him. The Claimant and Stevens therefore had a confidential relationship.

D. STEVENS'S ALIENATION AND DECEIT OF JONAS AND OTHERS

We have already set forth how Stevens caused the Claimant to begin viewing Jonas as one consigned to the Kingdom of Darkness because he had not professed to have been born again through the Church. Stevens soon had the Claimant convinced that Jonas was controlled by the Devil, and he constantly reminded her of this by piously asking her to pray for Jonas. This was done for the purpose of reducing the ability that Jonas had to influence the Claimant, so as to thereby increase Steven's dominion over her. It was a highly successful tactic. For two and one-half years the Claimant viewed Jonas with an odd mixture of love, hate, dread and pity. She regarded his objections to the $1 million gift as having been inspired by Satan to prevent God's work. She didn't give him a chance to object to the later gifts by not informing him of them, at Stevens's direction.

Stevens did not stop there. He convinced the Claimant that Jonas should get a full-time job. Not only that, he had her believing that Jonas should be earning enough money to support them in the style in which they were then living, a seemingly impossible goal for even the most successful free lance photographer. He said to her at one point: "Betsy, if I were your husband, I would earn so much money for you -- you would be so proud of me."

This all had its intended effect. The Claimant told Jonas that he should get a job and support them. It had been their practice to maintain separate checkbooks, with Jonas

paying house expenses from deposits made from the Claimant's investment income. As time went on, the Claimant objected more and more to the continuance of this practice. For the first time in their marriage, they began to bicker constantly over money. Jonas withdrew into his work, and took an increasing number of trips away from Lenox.

This is not to say that Jonas accepted any of this. It was obvious to him who was behind it, and he voiced strong objections to Stevens about what Stevens was doing. On April 16, 1985, he wrote to Stevens of the Claimant raising "questions about the way I live and my function as a husband," stating he believed that Stevens was the "catalyst" or "instrumental" in this change in her attitude toward him. He pointed out the absurdity of the Claimant telling him to get a full-time job in order to support the family while at the same time giving the Church $1 million. He asked for help from Stevens.

Stevens sent a letter in reply, full of pious platitudes and quotes from the Bible, protesting the charge that he had interfered in the marriage, and saying that he always told the Claimant to honor Jonas and had told her to give him $1 million. On May 20, 1985, Stevens added to this campaign of deceit by giving the Claimant a letter he wrote to her with the direction that she leave it in a spot where Jonas would be sure to find it, which she did. In that letter, Stevens purported to encourage the Claimant to obey and honor Jonas, and to permit Jonas to take part in all major financial decisions. This was at a time when he had just been successful in extracting $5 million from the Claimant and preventing Jonas from knowing about it.

Jonas wrote to Stevens again on October 7, 1985, saying he could no longer live with the Claimant under the terms she was dictating to him. He stated his belief that the Church was the heart of the problem, in what he considered a

"perversion of faith." He again pointed out the absurdity of the Claimant requiring him to support the family, in light of the inequality of their respective incomes. He closed by saying "I pray, sir, you give her no more financial advice, even if she asks for it." Stevens replied with more platitudes. Continuing his campaign to buy Jonas off, he related how he had told the Claimant to give Jonas $1 million.

On December 3, 1985, Jonas returned from a long trip to Pakistan and Afghanistan. He wrote to Stevens on December 7th, protesting the fact that the Claimant had recently given $10,000 to the Church without his knowledge. Soon thereafter he learned from Wallace Dayton of the $5 Million gift. He confronted Stevens, without telling him of this knowledge, and, as we have related, Stevens swore on a Bible that the Claimant had made no large gift to the Church after the $1 million gift the year before.

In November of 1985, after the Eagle articles came out, Stevens decided to implement his plan to buy Jonas off, and to increase the ante to $1.6 million, plus some Pennsylvania real estate, a promise of more money later, and a commitment by the Claimant to make subsequent gifts to the Church only from income rather than principal. In return, he wanted Jonas to promise not to try to influence the Claimant in her relationship with the Church.

Stevens told the Claimant to have Campoli dread up an agreement to this effect. He privately gave Hill her instructions, which included a clause whereby Jonas was to waive the right to any other property in the event of a later divorce. Hill and the Claimant then had several meetings with Campoli on the subject. Hill presented Campoli with an initial version of the agreement, which was entirely in her writing, and she worked with him on subsequent drafts. Campoli drew up

the agreement almost word for word from Hill's initial draft, and on December 16, 1985 the Claimant signed it. By that time, one of the Claimant's promises in the agreement had already been broken. The agreement contained a clause wherein she promised Jonas an "incredible amount" under her will; this was in stark contradiction to the fact that three days before she had signed a will leaving his as little as the law would allow. The Claimant then presented the proposed agreement to Jonas. Not surprisingly, he refused to sign it.

Stevens's activities in alienating the Claimant from others who could influence her, and his deceit of them, have already been described. It will be recalled Stevens had filled the Claimant's head with long harranges to the effect that all those upon whom she had previously depended, including her family, her present lawyer, Okabena and anyone who sought to frustrate her gifts to the Church, were possessed by demons and were doing the work of the Devil. His command that she lie to her father about her intentions on the $5 million was justified in these diatribes as legitimate frustration of the work of the Devil.

E. MANNER AND CIRCUMSTANCES OF GIFTS

The manner and circumstances of a gift can be significant in an inquiry concerning undue influence. *Neill v. Brackett, supra*, at 369, 126 N.E. at 94. The ways in which the gifts were given here were unusual and somewhat suspicious. The claimant gave the first million dollar gift outright, despite sound advice from financial advisors suggesting methods of avoiding the tax consequences of making a gift of that size at the end of the year. The second gift of five million dollars was made with no such independent advice whatsoever. For the Claimant to make a gift of that size in one lump sum without

any consideration of tax consequences or financial planning is astounding. The fact that she did so after consulting only with Stevens and nobody else, not even Jonas, is even more astounding. Finally, the "anonymous" gift of $500,000 to the Church is also somewhat unusual. She initially intended to make the gift in her own name, as she had with the other gifts. She changed the gift to an anonymous gift through Dean Witter at the request of Stevens, who wished to avoid any appearance of knowing about the gift or of its source because of recent adverse publicity. He still wanted the money, however, and was willing to accept any "anonymous" cash gifts the Claimant wished to make. In addition, despite the size of the gift, the Claimant again sought no advice as to the most advantageous way to make the gift; the manner and form of this gift were entirely to the advantage of the Church.

F. INFLUENCE AND DOMINION BY STEVENS IN HIS CONDUCT WITH CLAIMANT

Stevens's influence over the Claimant was achieved in part by deceit and insincerity in his dealings with her. He was insincere with her when he constantly told her that she had the power to release God's judgment by bringing about miracles through her gifts to the Church, that her primary purpose in life was to give her wealth to the Church, and that Jonas and others were controlled by demons. He had no good faith belief in these statements, as we will discuss later in this opinion.

Much time was devoted at trial to the question of whether Stevens and Baum knew of Turkia's release when they spoke by telephone to the Claimant on April 18th and April 21st. The Court ruled during the trial that the Church's counsel had made a binding judicial admission, in connection with pretrial discovery, that Turkia's wife was notified by telephone

of his release on the evening of April 17th. Mrs. Turkia testified that she must have misunderstood the telephone message of April 17th. But she conceded that around 6:30 P.M. Lenox time on April 18th, she had a twelve minute conversation with a minister of the Church in Vienna with whom Turkia spent that evening. Although she could not remember the details of that long conversation, she denied that she learned of his release during that conversation either.

Mrs. Turkia seems to have been confused and under a strain during that period. The Court finds, as a supplement to the judicial admission, that Mrs. Turkia knew of her husband's release no later than April 18th at 6:30 P.M. Lenox time. The Court further finds that Stevens and Baum were aware of Turkia's release when they discussed the impending $5 million gift with the Claimant over the telephone on the evening of April 21st.

Perhaps more has been made of this point than it deserves. The issue of the knowledge that Stevens and Baum had of Turkia's release is relatively insignificant when compared with their insincerity in telling the Claimant that her money had the power to bring about the release. It is this insincerity and its effect that is most relevant. It is as pernicious as their earlier insincerity in telling the Claimant that her money could cure Baum's migraine condition, and their deception of her that it did.

Implicit in all of the Claimant's dealings with Stevens, and indeed glaringly obvious, is his total dominion and control over her. This was accomplished through his express directions as well as through the various means already described. Stevens demanded the Claimant's total submission to him. He told her to concentrate on his every word. At his suggestion, she took

notes while in his presence, at private as well as public sessions. She would later study these notes.

Stevens advised the Claimant to use make-up, and to be more feminine in her dress and hairstyle. Although the Claimant was already quite attractive, she complied with these suggestions, thereby significantly changing her appearance. Stevens encouraged the Claimant to regard Baum, a former model, as a paradigm in this regard.

In short, the Claimant was a marionette at the end of a number of strings manipulated by Stevens. He often used Baum and Hill as his assistant puppeteers. The result was his complete ascendancy over the Claimant. The Claimant submitted to the overmastering effect of this influence.

G. CONCLUSION OF UNDUE INFLUENCE

The Church exercised undue influence upon the Claimant, not only because of the extent of Stevens's dominion over the Claimant, but only because of the various unfair and improper means which he used in gaining ascendency over her. We here highlight only a few. An important part of his strategy was to eliminate the ability of all others to influence her. The most despicable, and perhaps the most effective, aspect of this was the elimination of Jonas' ability to influence the Claimant. In doing this, Stevens showed no regard for the sanctity of marriage. His deceit and insincerity concerning Jonas all but destroyed the Claimant's marriage. His deceit and insincerity with respect to the other members of the Claimant's family drastically changed her attitude toward them, and also eliminated them as an alternate source of advice.

Stevens's relationship of trust and confidence with the Claimant creates no presumption of undue influence. The relationship did, however, facilitate his ability to unduly influence the claimant. Moreover, Stevens abused that relationship, in the ways already described. Among the most startling acts was the way that he dealt with the Claimant concerning her independent financial and legal advisors. Not once did he even suggest that she consult them. To the contrary, he advised her against doing this. Eventually, he succeeded in replacing them with advisors who owed their primary loyalty to him rather than the Claimant.

Stevens also unfairly, and unduly, influenced the Claimant through his insincerity in his statements to her. Particularly appalling is his insincerity in telling her that her mission from God on earth was to give money to the Church, that her money gave her the power to work miracles, and that Jonas and others were possessed by the Devil. He believed none of this, and yet he intended that the Claimant believe it and he knew that she did.

In light of the foregoing, and in light of the findings of fact contained throughout this opinion, we rule that all of the claimant's gifts were the product of undue influence exercised upon her by the Church through Stevens. *Bruno v. Bruno*, 384 Mass. 1, 422 N.E.2d 1369 (1981); *Miles v. Caples*, 362 Mass. 107, 284 N.E.2d 231 (1972); *Neill v. Brackett*, 234 Mass. 367, 126 N.E.2d 93 (1920).

III. FIRST AMENDMENT

The Church seeks the sanctuary of the First Amendment's command against laws prohibiting the free exercise of religion. We have previously overruled the Church's First Amendment objections to certain discovery sought by the Claimant, but at that time we reserved for later decision the possible effect that the First Amendment might have upon the merits of this claim. *See In re The Bible Speaks*, 69 B.R. 643 (Bankr. D. Mass. 1987). The Church now contends that the Claimant's cause of action is barred because it cannot be resolved without the Court inquiring into "prohibited areas involving religious concepts, such as belief in miracles and demons." It apparently takes the position that this claim presents a case concerning intrachurch differences in doctrine or practices, an area in which civil courts cannot tread. The Church would also have us view the Claimant's case as a complaint that she has been duped by allegedly false religious beliefs, so that its resolution requires a determination of the validity of those beliefs. In this rather generalized fashion, it seeks to throw a cloak of First Amendment immunity around what had transpired here.

The Church's First Amendment arguments do not withstand any close analysis. Nor are they supported by even one of the cases which it cites. We conclude that the First Amendment does not protect the Church from this claim, for three reasons: the distinction between Stevens's statements and the Church's beliefs and practices, Stevens's insincerity, and the compelling policy grounds that support the claim. Each of these considerations, in our opinion, is sufficient to deny the Church

its asserted constitutional privilege. Taken together, they are overwhelming. We shall discuss each separately.

A. DISTINCTION BETWEEN STEVENS'S STATEMENTS AND CHURCH BELIEFS AND PRACTICES

There is, of course, no question that the Church is a religion whose views are entitled to First Amendment protection. It is a Christian church which places emphasis upon the Bible. We need not, and constitutionally we cannot, go beyond this obvious observation. There is therefore no occasion here to make the type of delicate threshold inquiry that a court must make when a party claims constitutional privilege by reason of adherence to a religion which is not among the commonly recognized religions, an inquiry which no longer can concentrate on theism. *See Malnak v. Yogi*, 592 F. 2d 197 (3d Cir. 1979); *Theriault v. Carlson*, 495 F. 2d 390 (5th Cir. 1974), *cert. den.* 419 U. S. 1003 (1974); *The Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir. 1969), *cert. den.* 396 U.S. 963 (1969); *Van Schaick v. Church of Scientology of California, Inc.*, 535 F. Supp. 1125 (D. Mass. 1982); *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968); *Holy Spirit Association for the Unification of World Christianity v. Tax Commission of City of New York*, 55 N.Y. 2d 512, 450 N.Y.S. 2d 292, 435 N.E. 2d 662 (1982). *See also Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981); Note, *Toward a Constitutional Definition of Religion*, 91 Harv. L. Rev. 1056 (1978).

We recognize also that there can be no bright line in free exercise cases between religious belief and action, and that action in some circumstances in equally entitled to protection.

Murdock v. Pennsylvania, 319 U. S. 105 (1943); *Cantwell v. Connecticut*, 310 U. S. 296 (1940); *People v. Woody*, 61 Cal. 2d 716, 394 P. 2d 813, 40 Cal. Rptr. 69 (1964). That distinction, in any event, is especially blurred here where the conduct for which privilege is sought, when viewed in isolation, consists of statements, rather than action in the usual sense.

The First Amendment protects only the religious beliefs and practices of the party claiming the privilege. *Wisconsin v. Yoder*, 406 U. S. 205, 230-231 (1972). *Van Schaick v. Church of Scientology of California, Inc.*, 535 F. Supp. 1125, 1141 (D. Mass. 1982). The Church's First Amendment argument flounders on this basic principle. The Claimant does not contend that she has been defrauded by false or pernicious religious beliefs or practices of the Church, or that she was unfairly manipulated into adopting the Church's beliefs or practices. The Claimant's complaint has nothing to do with the validity or reasonableness of the Church's religious beliefs or practices. She charges only that undue influence was exerted upon her which consisted, in part, of certain statements of Stevens previously referred to having reference to God and the Devil. Stevens, among his many other ploys and manipulations, told the Claimant that she could effect God's miracles through her gifts to the Church; that her primary mission on earth, by the command of God, was to give money to the Church; and that Jonas, her family and her advisors, and all of those who have not been born again through the Church, were possessed by demons so that they are the instruments of the Devil.

It is abundantly clear from the evidence offered by the Church itself that these statements do not represent Church doctrines or practices. Nor does the Church even contend otherwise. To the contrary, we have the testimony of Stevens

and Pastor John Leonard, President of The Stevens School of the Bible, both of whom were examined specifically concerning the statements. Both denied that Stevens's statements represent Church doctrines, beliefs or practices. They categorically denied that the Church believed or practiced the doctrines that wealthy people such as the Claimant have as their primary mission on earth the giving of money to the Church, or that they can bring about God's miracles through gifts to the Church. They also denied the existence of any Church doctrine that those who have not been born again through the Church are controlled by demons and are instruments of the Devil. In fact, Stevens denied making the statements at all. The statements do not, moreover, represent Stevens's personal religious beliefs.

This case is, therefore, quite different from one in which the complaint is based upon statements such as "God will reward you for giving to His Church." That statement would be perfectly consistent with Church beliefs and practices, and may, on its face, be entitled to constitutional protection. Such a statement would also, of course, lack the compelling nature of what was actually said to the Claimant.

We are not dealing here with something akin to a complaint against the Hare Krishnas for fraud in their religious practice known as Sankirtan, which consists of proselytizing through a public solicitation that includes the sale of trinkets. Sankirtan is an essential practice in the Hare Krishna religion, so that restrictions upon it raise substantial First Amendment questions. *See International Society for Krishna Consciousness, Inc. v. Barber*, 650 F. 2d 430, 441 (2d Cir. 1981). Here, not only were Stevens's statements opposed to Church beliefs and practices, Stevens even asserted that they were contrary to a

Church policy of soliciting funds on an individual basis rather than through general exhortation from the pulpit.

Our conclusion that a minister of a church, in speaking of God and the Devil, was not imparting the beliefs and practices of his church would in some circumstances be a determination that is frought with peril. A court should not normally, over the protests of a party, label as unreligious the statements or actions of that party. This is the clear message of *Thomas v. Review Board of Indiana*, 450 U. S. 707 (1981), which involved a Jehovah's Witness who quit his job because of his convictions against war when he was transferred to a plant which manufactured tanks. He said that he did this for religious reasons, but he admitted that a fellow worker, also Jehovah's Witness, did not have the same compunctions. When he later applied for unemployment benefits, the Supreme Court of Indiana took an objective view and concluded that he acted out of personal philosophical motives rather than for religious reasons. The Supreme Court reversed, ruling that it was not for a court to indulge in such refined analysis over the protest of one having honest religious convictions. Our case, however, is much different. Here, not only does the Church make no attempt to identify Stevens's statements as part of Church beliefs or practices, it takes the unequivocal position that they are not its beliefs or practices. We therefore engage in no conclusions contrary to stated subjective religious beliefs of a party as did the Supreme Court of Indiana in *Thomas*.

The Church places heavy reliance on *Molko v. Holy Spirit Association for the Unification of World Christianity*, 179 Cal. App. 3d 450, 224 Cal. Rptr. 817 (1986), which is presently on appeal to the Supreme Court of California. In that case, former church members brought suit against the Unification

Church, which was founded by Reverend Sun Myung Moon in Korea. The plaintiffs sought damages for fraud, intentional infliction of emotional distress, and false imprisonment. One plaintiff also claimed restitution for $6,000 contributed to the church while he was a member. The court dismissed the count for fraud because, although the plaintiffs had initially been deceived as to the nature and identity of the church when they were first recruited, they soon learned the true facts and chose to stay on thereafter. The counts for false imprisonment and intentional infliction of emotional distress were also dismissed because there had been only "coercive persuasion" in the religious realm, such as threats of divine retribution, rather than physical restraint or threats of physical harm.

The count for restitution in *Molko*, the claim most similar to that of the Claimant here, was grounded on fraudulent inducements to join the church, as well as domination of the plaintiff through physical and psychological manipulation. The plaintiff had given $6,000 upon being told that the church was in desperate need of funds, and that "the Heavenly Father would really appreciate, and really look favorably on seeing me give the money to the church." The court found that he freely gave the money out of religious beliefs of the Unification Church which he no longer held at the time of the suit. It concluded that adjudication of his claim would necessarily involved inquiry into the reasonableness of those beliefs, an inquiry which the First Amendment forecloses. It relied upon *United States v. Ballard*, 322 U. S. 78 (1944), the seminal Supreme Court decision holding that the First Amendment prohibits adjudication of the truth or falsity of religious beliefs. In *Ballard*, the Supreme Court dismissed a prosecution for mail fraud against members of the "I am" movement for having made allegedly false representations

concerning various religious tenets, such as the belief that the leader's movement had the power to heal incurable diseases.

Molko is quite distinguishable from our case. The undue influence charged there consisted primarily of allegedly unfair psychological manipulation into adoption of religious beliefs. The court regarded these beliefs as having motivated the gift. It correctly ruled that any determination of improper conduct by the church would necessarily require an assessment of the reasonableness of its religious beliefs, and that this assessment is constitutionally foreclosed. That is not our situation. We have no occasion to assess the reasonableness of the Church's doctrine and practices. We are concerned only with Stevens's statements. The Claimant does not even charge that Stevens's statements were false, so that, even with respect to his statements, this case cannot be viewed as a civil action equivalent of *Ballard*.

Katz v. Superior Court, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977), was relied upon by the court in *Molko* and is similar to it. The parents of adult children who had joined the Unification Church sought to have themselves appointed guardians of the children over their objection. The parents alleged that the children, to their detriment, had changed their life style as the result of the church's coercive persuasion concerning its religion. The court recognized that it was being asked to determine the validity of the beliefs of the children. It found no compelling policy reason to do so. Citing *Ballard*, it correctly dismissed the suit.

Nor is the Church aided by any of the other cases which it cites. *Meroni v. The Holy Spirit Association for the Unification of World Christianity*, 506 N.Y.S. 2d 174 (N.Y. App.

Div. 1986), is not on point. That was a suit by a father charging that the Unification Church had intentionally inflicted emotional distress upon his son, which caused the son to commit suicide. The court merely held that, under traditional tort law, the church's alleged "brainwashing" was not sufficiently extreme or outrageous conduct to be actionable. *Baumgartner v. First Church of Christ, Scientist*, 141 Ill. App. 3d 898,490 N.E.2d 1319 (1986), *cert. den.* 107 S. Ct. 317 (1986), was an action for the wrongful death of a former church member which was allegedly caused by the church's deviation from standard Christian Scientist care and its negligence is failing to withdraw the decedent from the Christian Scientist treatment he was receiving. The court dismissed the case, holding that the First Amendment prohibits the requested inquiry into the validity and propriety of Christian Science beliefs, citing decisions such as *Thomas*. Obviously, that case involved an asserted conflict between church beliefs and individual rights. No such conflict exists here.

The Church seeks to buttress its argument of constitutional privilege by citing decisions in *The Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevick*, 426 U. S. 696 (1976); *Presbyterian Church of the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440 (1969); *Kedroff v. St. Nicholas Cathedral*, 363 U. S. 190 (1960). These decisions are wide of the mark. They deal with either doctrinal or administrative disputes within a church. In them, the Supreme Court established the wise principle that the government should not become embroiled in internecine church matters. It rejected the English common law doctrine that property contributed to a church is impressed with an implied trust in favor of the doctrines and practices of the church in effect at the time of the contribution. To the same

effect is *Madsen v. Erwin*, 395 Mass. 715, 481 N.E. 2d 1160 (1985), which involved the firing of an employee by the Christian Scientist Church because of the church's religious convictions against homosexuality. The court dismissed the suit as one involving hierarchical polity on matters of internal organization and faith.

Those considerations are far removed from what is before the Court here. We are not concerned with internal church division or schism *(Presbyterian Church, Kedroff)* or the propriety of the defrocking of a bishop *(Serbian Orthodox Diocese)*. The present case is more like *General Council on Finance & Administration, United Methodist Council v. California Superior Court*, 439 U. S. 1369 (Rehnquist, Circuit Justice 1978), which involved an action against a church for breach of contract, fraud and violations of security laws. In denying the church's application for a stay, Justice Rehnquist distinguished the *Kedroff* line of cases as involving matters of ecclesiastical cognizance and polity over which civil courts should not become entangled. As in *United Methodist Council*, there is no dispute here concerning the interpretation or propriety of the Church's doctrines or practices.

The Church seeks support in the following passage from L. Tribe, *American Constitutional Law* 874 - 75 (1978):

> Once it is conceded that first amendment values are unacceptably compromised when civil courts undertake to settle religious issues, it becomes clear that allowing a legal determination about property or some other secular matter to turn on a court's answer to a religious question represents a path fraught with peril: the path is one along which

> unsatisfied former believers could drag the civil courts into the theological thicket by the simple expedient of suing for a refund of their prior donations to a religious organization.

This passage is a part of Professor Tribe's discussion of *Presbyterian Church, Kedroff* and *Serbian Orthodox Diocese*. He is speaking of a suit by an apostate or dissident who seeks a refund because of his disagreement with a church's doctrines or religious practice, such as in the *Molko* case.

In summary, our decision does not turn upon the truth or reasonableness, or even the sincerity, of the Church's doctrines or practices. The Claimant does not dispute them, nor is there any question as to what they are. The Claimant is not a Church dissident or apostate contesting Church doctrine. She does not attack Church practices in obtaining or keeping her as a parishioner. Her complaint is that Stevens's entire course of conduct constituted undue influence upon her on behalf of the Church. Included within that conduct are certain statements pertaining to God and the Devil which have been disavowed by the Church as part of its doctrine. Obviously her gifts were religiously motivated, as is true of all undue influence cases against church or clergy, but it is the exploitation of her religious motivations through unfair means that constitutes an element of her cause of action.

B. Insincerity of Stevens in Making Statements

We are equally persuaded, even assuming that Stevens's statements would otherwise be entitled to First Amendment protection, that the Church's claim of privilege

must fail because of Stevens's insincerity. Sincerity has traditionally played an important role in the protection of rights under the free exercise of religion clause. Good faith is often a vital consideration when a court is called upon to conduct an initial threshold inquiry to determine whether the views of an organization are entitled to protection. *See Malnak v. Yogi*, 592 F. 2d 197 (3rd Cir. 1979); *Theriault v. Carlson*, 495 F. 2d 390 (5th Cir. 1974), *cert. den.* 419 U.S. 1003 (1974); *The Founding Church of Scientology v. United States*, 409 F.2d 1146 (D.C. Cir. 1969); *United States v. Kuch*, 288 F. Supp. 439 (D.D.C. 1968). Good faith and sincerity are also relevant even though the religious nature of the organization claiming the privilege in not in question. In *Wisconsin v. Yoder*, 406 U. S. 205 (1971), the court was faced with the claim of members of the Amish Mennonite Church to an exemption from a state law requiring their children to attend public or private school. Formal high school education was claimed to be contrary to Amish beliefs because it placed their children in an environment that emphasized materialistic competition. In granting the Amish their requested exemption, the court emphasized their deep religious "conviction" concerning the matter. 406 U. S. at 216. *Thomas v. Review Board of Indiana*, 450 U. S. 707 (1981), is to the same effect. The court there required payment of unemployment benefits to a Jehovah's Witness because he had terminated his employment by reason of his "honest conviction" that working at a weapons plant was against his religion. 450 U. S. at 716. *United States v. Seeger*, 380 U. S. 163 (1965), granted an exemption from the draft to a conscientious objector because of his sincere and meaningful beliefs opposed to war. Although this decision on its face was concerned only with interpretation of the selective service statute, it is clear from its reasoning that the court regarded its interpretation of the statute as constitutionally required.

Scrutiny of the sincerity of a religious belief "involves a somewhat truncated inquiry which must focus on extrinsic evidence." *Van Schaick, supra*, at 1145. *International Society for Krishna Consciousness, Inc. v. Barber*, 650 F. 2d 430, 441 (2d Cir. 1981). The extrinsic evidence here is overwhelming in showing Stevens's insincerity. His entire course of conduct is replete with hypocrisy concerning matters that do not involve religious topics. His insincerity is also indicated by his denial that he made the statements at all and his concession that they do not represent Church doctrine. The statements concerning God and the Devil were but a part of a course of manipulative conduct.

We recognize that the withdrawal of First Amendment privileges because of insincerity has its dangers. It is conceivable to imagine situations where a finding of insincerity by a court can be a disguised way of holding that religious beliefs are false or invalid. *See United States v. Ballard*, 322 U. S. 78, 92 - 95 (1944) (Jackson, J., dissenting). But those dangers are not present here for two reasons. First, there is ample evidence of Stevens's insincerity, evidence which is quite independent of the statements themselves. Second, it is undisputed that his statements do not represent Church beliefs or practices.

The decision in *Estate of Supple*, 247 Cal. App. 2d 410, 55 Cal. Rptr. 542 (1966), *cert. den.* 389 U. S. 820 (1967), is instructive on the relevance of Stevens's insincerity. *Supple* involved a claim for undue influence of a testator brought against the Roman Catholic Church, which was the principal beneficiary under the will. It was alleged that the church had imparted various religious tenets to the testator, and that these tenets were "false." The court dismissed the claim on the

authority of the *Ballard* decision, but only after declaring that insincere religious beliefs are not protected and pointing out that there had been no allegation of insincerity. The church in its answer had denied some of the alleged tents, and the court recognized that such denials could provide grounds for finding insincerity. The court dismissed the complaint notwithstanding this because the plaintiff had previously been given ample opportunity to amend. Here the question of insincerity is fully open and the answer is obvious.

C. COMPELLING REASONS SUPPORTING CLAIM

There are compelling policy reasons supporting this claim which provide an independent basis for denial of a First Amendment privilege. The law is a process of constant adjustment between conflicting rights for the common good. No asserted right can at all times and in all circumstances be superior to all others. And so it is with the First Amendment, despite its exalted place in our law. For example, freedom of speech and the press are placed in the same high category as the right to the free exercise of religion, and yet rights under the law of libel and slander are preeminent.

Most of the cases concerning the free exercise clause involve attempted regulations by the state. It is well established that the state can enact reasonable regulations governing the time, place and manner of the exercise of religion. *Cantwell v. Connecticut*, 310 U. S. 296 (1940). The state may, for example, require a permit for the conduct of a religious procession on public streets, *Cox v. New Hampshire*, 312 U. S. 569 (1941), or for the holding of religious services in a municipal park. *Poulos v. New Hampshire*, 345 U. S. 395 (1953). The state may also

make members of the Hare Krishna religion practice their rite of Sankirtan only at an assigned booth in a state fair, rather than throughout the public fairgrounds, *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U. S. 640 (1981), and make Orthodox Jews close their business on Sundays, *Bromfield v. Brown*, 366 U. S. 599 (1961). A valid time, place and manner restriction must, however, serve a significant government interest. *Heffron*, 452 U. S. at 649.

In *Bear v. Reformed Mennonite Church*, 462 Pa. 330, 341 A. 2d 105 (1975), the principle of permitting subordination of free exercise rights to significant government interests was applied to a private cause of action. The plaintiff had been excommunicated from the Reformed Mennonite Church because of his criticism of the church's teachings and practices. In addition to excommunication, the church also ordered its members to "shun" him. Shunning was a practice of the church which involved a total boycott, whereby members were prohibited from having business or social contact with the pariah. The plaintiff alleged that this had caused his business and marriage to collapse. He claimed that not only had he lost customers and suppliers, but also his wife and children refused to have contact with him. The court overruled a dumurrer to the complaint for equitable relief. It cited the Supreme Court decisions allowing state regulation to which we have referred, and held that the plaintiff had alleged excessive interference in areas of paramount state concern pertaining to the maintenance of sound marital and family relations free from the alienation efforts of others, as well as the maintenance of a business free from tortious interference.

In *Radecki v. Schuckardt*, 50 Ohio App. 2d 92, 361 N.E. 2d 543 (1976), several husbands brought an action for

alienation of affection of their wives against a church of the Roman Catholic faith and a bishop of the church. The church and the bishop were opposed to recent changes in the international church, and taught Roman Catholicism as it had existed before the changes. The wives left the husbands and took their children from Toledo to Idaho so that they could get the desired religious education with the bishop. A jury awarded compensatory and punitive damages to the husbands. The appeals court reversed, but on the ground that there was no evidence the church intended to destroy the marriages. The court noted that a strong and compelling state interest, such as the preservation of marriage, could justify a cause of action based upon such intentional conduct despite free exercise rights. *Radecki*, 50 Ohio App. 2d at 94, 361 N.E. 2d at 545 - 46.

The interests which the Claimant seeks to protect are equally compelling. A cause of action for undue influence is grounded upon important policy considerations favoring the distribution of property in accordance with free exercise of the human will untramelled by psychological or physical coercion. Moreover, in this case, as in *Bear*, we are confronted with intentional conduct that threatened a marriage and a family, the basic social unit. Stevens's attempts to ruin the Claimant's marriage were intentional and malicious. These considerations, to our mind, far outweigh any restriction today's ruling places upon the Church's right of free exercise, even if Steven's statements would otherwise be entitled to protection on their face. We also have in mind that his statements are but a part of other conduct that reeks of undue influence and raises no First Amendment issues.

IV. CONCLUSION

The Church cannot, under the cloak of religion, commit wrongs upon the public. *Cantwell v. Connecticut*, 310 U. S. 296, 306. The Claimant is entitled to recover all her contributions because of the Church's undue influence. We except from this ruling, however, the $10,000 cash gift which she made to Stevens personally. There has been no proof that the church received this gift. The claim is therefore ALLOWED in the sum of $6,581,356.25. A separate judgment shall issue.

At Worcester, this 19 day of May, 1987.

s/_____
James F. Queenan, Jr.
U. S. Bankruptcy Judge